IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1979

No. 79-492

ROBERT MICHAEL FUNGAROLI,

Appellant

vs.

JUDITH DIANE FUNGAROLI,

Appellee

APPEAL TO THE UNITED STATES SUPREME COURT TO REVIEW THE DECISION OF THE NORTH CAROLINA SUPREME COURT

# JURISDICTIONAL STATEMENT

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September 10, 1979

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IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1979

ROBERT MICHAEL FUNGAROLI,

Appellant

vs.

JUDITH DIANE FUNGAROLI,

Appellee

APPEAL TO THE UNITED STATES SUPREME COURT TO REVIEW THE DECISION OF THE NORTH CAROLINA SUPREME COURT

## JURISDICTIONAL STATEMENT

---

Appellant, Robert Michael Fungaroli, appeals the judgment of the North Carolina Court dismissing his appeal on June 13, 1979.

## OPINIONS BELOW

Appellant filed an appeal to the North Carolina Court of Appeals on June 2, 1978, wherein he contested, inter alia, the propriety of the trial court, i.e., the Civil District Court of Forsyth County,

conducting a temporary alimony hearing at the request of the now appellee-wife without notice to the now appellant-husband and a subsequent alimony award to the appellee. Appellant advanced as his major point of contention that (1) since his property rights were to be affected by said hearing, he was entitled to notice and opportunity to be heard, and (2) that the provisions of N.C. G.S. 50-16.8(e)(infra) dispensing of notice requirements in certain situations were unconstitutional as applied in this case. Appellant centered his contention of unconstitutionality in this case, inter alia, on the fact that neither he nor his attorney of record was notified of the hearing. The Court of Appeals of North Carolina affirmed the trial court's ruling on March 20, 1979. The Supreme Court of North Carolina dismissed the appellant's appeal for lack of a substantial constitutional question by an amended judgment dated June 13, 1979.



## JURISDICTION

This action is an appeal from a holding by the North Carolina Court of Appeals and North Carolina Supreme Court that a statute is constitutional. This appeal is brought forward under 28 U.S.C. sec. 1257 (2) and 1257(3). The order of the District Court of Forsyth County is dated March 1, 1978; the opinion of the North Carolina Court of Appeals is dated March 20, 1979; and the order of the North Carolina Supreme Court is dated June 13, 1979. Notice of appeal was filed with the North Carolina Supreme Court on September 4, 1979.

Cases believed to sustain jurisdiction are: Fuentes vs. Shevin, 407 U.S. 67, 32 L.Ed.2d 556, 92 S.Ct. 1893; Sniadach vs. Family Finance Corp., 395 U.S. 337, 23 L.Ed. 2d 349, 352, 89 S.Ct. 1820.

The statute, the validity of which is questioned, is N.C.G.S. 50-16.8(3) found

in Volume 2A of the North Carolina General Statutes at page 852 and reads as follows:

> "(e) No order for alimony pendente lite shall be made unless the supporting spouse shall have had five days' notice thereof; but if the supporting spouse shall have abandoned the dependent spouse and left the State, or shall be in parts unknown, or is about to remove or dispose of his or her property for the purpose of defeating the claim of the dependent spouse, no notice is necessary."

## QUESTION PRESENTED

Whether due process guarantees a litigant the right of notice and an opportunity to be heard and, further, whether North Carolina General Statute 50-16.8(e)(infra) which, inter alia, provides that a judge may dispense with notice requirements and due process upon a finding that a litigant, i.e., a supporting spouse within the definition of North Carolina domestic relations law, has abandoned the State and whether the Court may then proceed to conduct a



hearing affecting substantial property rights without notice to the alleged abandoning or fleeing spouse or to his attorney of record who has already made a general appearance in the case.

## STATUTES AND RULES

18 U.S.C. 1257(2)

18 U.S.C. 1257(3)

N.C.G.S. 50-16.8(e)

## STATEMENT OF THE CASE

In the instant case, appellant(husband/father) filed a custody action under N.C.G.S. 50-13, et. seq., on December 21, 1977. On February 18, 1978, the trial court entered an ex parte order allowing the appellee (wife/mother) specific visitation privileges. On February 24, 1978, the trial court entered an ex parte order that the plaintiff show cause, if any there be, as to why he should not be punished as for contempt for violation of the order of February 18, 1978.

On February 28, 1978, the appellee filed answer and counterclaim for custody of the minor child pursuant to N.C.G.S. 50-13, et. seq., and for alimony pursuant to N.C.G.S. 50-16.1, et. seq. The next day, on March 1, 1978, the appellee filed a motion for alimony pendente lite and attorney's fees; and a hearing was conducted on the same day on said motion, and appellant was ordered to pay temporary alimony. At the time of the hearing ordering temporary alimony, the answer and counterclaim of the appellee had not been served upon the appellant or his attorney of record. Furthermore, at the time of the temporary alimony hearing, neither the appellant nor his counsel of record had been served with any notice of said hearing. The appellant appealed from this order and contended that the beforementioned constitutional rights under the Constitution of the United States



and the Constitution of North Carolina were violated in that said appellant was not given proper notice and/or opportunity to be heard under the circumstances; that essential elements of "due process of law" and "law of the land" are notice and opportunity to be heard or defend in accordance with established rules which do not violate fundamental rights.

On March 6, 1978, a hearing was conducted on the ex parte show cause order arising out of the ex parte order allowing the appellee (wife/mother) specific visitation privileges. Neither the appellant nor his counsel was given any notice of the ex parte order allowing said appellee specific visitation privileges. The appellant appealed from the order entered March 6, 1978, finding him in contempt of said ex parte specific visitation privileges order and contended that his constitutional rights

under the Constitution of the United States and Constitution of North Carolina were violated in the same manner and respect as stated in the preceding paragraph.

These constitutional issues were timely raised in the appeal to the North Carolina Court of Appeals. The appellant contends that the decision and order of the North Carolina Court of Appeals has not addressed itself in any manner to the constitutional issues as presented and that, if it is determined that the North Carolina Court of Appeals did address itself to said constitutional issues, the decision of the said North Carolina Court of Appeals has erroneously ruled upon said issues.

THE QUESTION IS SUBSTANTIAL

THE COURT ERRED IN CONDUCTING AN ALIMONY PENDENTE LITE HEARING AS THE APPELLANT DID NOT HAVE NOTICE OF SAID HEARING.

As the Court conducted a hearing on March 1, 1978, upon appellee's motion for



temporary alimony without the appellant's receiving notice of said hearing, the appellant contends that this lack of notice is not only a violation of his statutory rights under N.C.G.S. 50-16.8(e), but this is also a violation of the Fourteenth Amendment to the Constitution of the United States and Article 1, Section 17 of the Constitution of the State of North Carolina.

The appellee's answer and counterclaim for, inter alia, alimony pendente lite and permanent alimony was filed in the office of the Clerk of Superior Court of Forsyth County, North Carolina, on February 28, 1978. (See Ct. of App. R. pp 16-18) Said document was filed 58 days after the original complaint herein had been served on the appellee. (See Ct. of App. R. p 1) A notice of hearing of the alimony pendente lite hearing was never filed and/or served upon the appellant OR HIS COUNSEL OF RECORD. The ex

parte hearing was conducted on March 1, 1978, (see Ct. of App. R. p 21) the day after the beforementioned answer and counterclaim was filed. Neither appellant nor his counsel was notified of said hearing.

Concerning this lack of notice, the court, in its order, stated:

> "It appearing to the Court that the plaintiff has left the State of North Carolina, no notice was given of defendant's Motion, and, in the opinion of the Court, none is required pursuant to the provisions of N.C. G.S. Sec. 50-16.8(e)."

N.C.G.S. 50-16.8(e) states:

> "No order for alimony pendente lite shall be made unless the supporting spouse shall have had five days' notice thereof; but if the supporting spouse shall have abandoned the dependent spouse and left the State, or shall be in parts unknown, or is about to remove or dispose of his or her property for the purpose of defeating the claim of the dependent spouse, no notice is necessary."

It is obvious that the court was of the opinion that it could conduct the hearing



upon a finding that the appellant "had abandoned the dependent spouse and left the State." The appellant respectfully contends that the provisions of N.C.G.S. 50-16.8(e) are not only unconstitutional as applied herein, but that it was not the intent of the Legislature to allow such a hearing when a party to the litigation has counsel of record.

In the case of McLean vs. McLean, 233 N.C. 139, 63 S.E.2d 138 (1951), the plaintiff brought action against defendant for divorce. The divorce decree was rendered, but thereafter the trial court entered order setting aside the divorce decree for the reason that the plaintiff, who had served the defendant by publication, actually had knowledge of the wife's residence and post office address. The eventual contention of the defendant was, of course, that the defendant's due process of law had

been violated. Justice Devin stated the following, at page 143:

> "The defendant also asserts as reason for vacating the judgment of the County Court that she has thereby been deprived of personal and property rights without due process of law. We do not reach that queation, but it may be observed that under the provisions of the Constitution of North Carolina Art. I, Sec. 17, that no person be deprived of property 'but by the law of the land,' as well as under the parallel provisions of the 14th Amendment to the Constitution of the United States, it is required that an adjudication affecting the marital status and finally determining personal and property obligations shall be heard. Markham v. Carver, 188 N.C. 615, 125 S.E. 409; Bowie v. West Jefferson, 231 N.C. 408, 57 S.E.2d 369; Truax v. Corrigan, 257 U.S. 312, 42 S.Ct. 124, 66 L.Ed. 254. 'An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 657."



On this issue, Strong's 3 N.C. Index 3rd, Sec. 24.1, "Constitutional Law," states:

> "Notice and hearing are essential to due process of law under the Fourteenth Amendment to the Constitution of the United States, and Art. I, Sec. 17, of the state constitution."

The appellant brings particular attention and meaning to the following words quoted from McLean vs. McLean, supra:

> ". . . notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections."

Surely, due process of law, at the least, would require notice to the attorney of record herein.

The United States Supreme Court has ruled numerous times that, where the taking of one's property is so obvious, it needs no extended argument to conclude that, absent notice and a prior hearing, a violation of the most fundamental principles of due

process occurs. Coe vs. Armour Fertilizer Works, 237 U.S. 413, 423.

There are decisions to the effect that one may be deprived of property by summary administrative action taken before a vital governmental interest. See e.g., Ewing vs. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950). This principle of exception has been strictly construed. As stated in Fuentes vs. Shevin, 407 U.S. 67, 32 L. Ed.2d 556, 92 S.Ct. 1893, there are "extraordinary situations" that justidy postponing notice and opportunity for a hearing. Boddie vs. Connecticut, 401 U.S. 379, 28 L. Ed.2d at 117. These situations must be truly unusual: First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Secondly, there has been a special need for very prompt action. Thirdly, the State has strict control over



the monopoly of legitimate force. Fuentes, supra, at p. 92. Examples of allowances of summary seizures of property are as follows: (1) to collect internal revenue, Phillips vs. Commissioner, 283 U.S. 589, 75 L.Ed. 1289, 51 S.Ct. 608; (2) to meet the needs of the national war effort, Central Union Trust Co. vs. Garvan, 254 U.S. 554, 566, 65 L.Ed. 403, 408, 41 S.Ct. 214; (3) to protect public from misbranded drugs, Ewing vs. Mytinger & Casselberry, Inc., 339 U.S. 594, 94 L.Ed. 1088, 70 S.Ct. 870; (4) to protect persons from contaminated food, North American Storage Co. vs. Chicago, 211 U.S. 306, 53 L.Ed. 195, 29 S.Ct. 101. Surely, it can be argued that no such "extraordinary situation" existed in the case sub judice.

The paramount point sub judice is that the appellant had an attorney of record who, if given notice, presumably could

have protected his client's interests. As stated in 16 Am.Jur.2d, Sec. 573, "Constitutional Law," p. 579, a state or Federal court which arbitrarily refuses to hear a party by counsel employed by and appearing for him, in any case, civil or criminal, denies the party a hearing and therefore denies him due process of law in the constitutional sense. Reynolds vs. Cochran, 365 U.S. 525, 5 L.Ed.2d 754, 81 S.Ct. 723.

Non-notification of a hearing to a party who is absent but has an attorney of record is a travesty, a miscarriage of justice. N.C.G.S. 50-16.8(e), as applied in the instant case, is repugnant to the Constitution of the United States. Surely, this case is of significant public interest so as to require plenary consideration by the highest Court in the land.



## CONCLUSION

The appellant contends that this case is important; that the State statute as applied is unconstitutional; and respectfully asks this Court to order full argument and to resolve this issue in the appellant's favor. If an appeal is not deemed to be the appropriate mode of review by this Court, your appellant respectfully asks that his appeal be treated as a petition for writ of certiorari.

Respectfully submitted,

John F. Morrow
Counsel for appellant
MORROW, FRASER & REAVIS
Suite 325, NCNB Plaza
Winston-Salem, N. C. 27101

CERTIFICATE OF SERVICE

I certify that on September 10, 1979, I mailed a copy of the foregoing Appeal to the United States Supreme Court to Review the Decision of the North Carolina Supreme Court to B. Ervin Brown, II, attorney for appellee, Suite 315, NCNB Plaza, Winston-Salem, North Carolina 27101.

John F. Morrow
Counsel for appellant
MORROW, FRASER & REAVIS
Suite 325, NCNB Plaza
Winston-Salem, N. C. 27101



APPENDIX A

NORTH CAROLINA )
) IN THE GENERAL COURT OF JUSTICE
FORSYTH COUNTY ) DISTRICT COURT DIVISION
77 CVD 4340

ROBERT MICHAEL FUNGAROLI, Plaintiff
vs. ORDER
JUDITH DIANE FUNGAROLI, Defendant

THIS MATTER comes before the Court on the Motion of defendant for alimony pendente lite and for attorneys fees. It appearing to the Court that the plaintiff has left the State of North Carolina, no notice was given of defendant's Motion, and, in the opinion of the Court, none is required pursuant to the provisions of N.C.G.S. §50-16.8(e). The Court having considered the verified Complaint, the verified Answer and Counterclaim, and the Affidavit of defendant, and being otherwise fully advised in the premises, does hereby make the following

FINDINGS OF FACT

1. That the plaintiff, Robert Michael Fungaroli, has left the State of North Carolina and is living presently in Springfield, Virginia.

2. That the plaintiff, Robert Michael Fungaroli, left the State of North Carolina, and carried with him the minor child, Derek Cassidy Fungaroli, after he had filed the instant action, and after the defendant had answered and counterclaimed for alimony, alimony pendente lite, and custody of the minor child, and after this Court had entered an Order herein dated February 18, 1978, requiring the plaintiff to allow the de-

fendant to visit with her minor child, Derek Cassidy Fungaroli.

3. That the defendant is presently unemployed each and every day subsequent to her hospitalization which commenced on December 21, 1977, and ended on February 16, 1978; that the defendant has no income from any source whatsoever at the present time, and has no residence of her own rather than that being presently provided on a temporary basis by her relatives.

4. That the plaintiff is the co-owner of a partnership, Ridgetop Records, located in the City of Winston-Salem, North Carolina, and is therefore gainfully employed.

5. That at no time subsequent to December 21, 1977, has the plaintiff provided the defendant with any subsistence in any form.

6. That commencing on or about the first week of January, 1978, and continuing up and including the present date, the plaintiff has wilfully obstructed defendant in her attempts to return to her home at 317 Lucinda Lane, Kernersville, North Carolina.

Based on the following Findings of Fact, the Court hereby makes the following

CONCLUSIONS OF LAW

1. That the plaintiff is a supporting spouse and the defendant a dependent spouse within the meaning of N.C.G.S. §50-16.1(3),(4).

2. That the plaintiff, Robert Michael Fungaroli, has abandoned the defendant, Judith Diane Fungaroli, and has maliciously turned the defendant out of doors.



3. That the plaintiff, Robert Michael Fungaroli, has offered such indignities to the person of the plaintiff, Judith Diane Fungaroli, as to render her condition intolerable and her life burdensome.

4. That the plaintiff, Robert Michael Fungaroli, has wilfully failed to provide the defendant, Judith Diane Fungaroli, with necessary subsistence according to his means and condition so as to render the condition of the defendant, Judith Diane Fungaroli, intolerable and the life of the defendant burdensome.

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED, ADJUDGED and DECREED:

1. That commencing on Monday, March 6, 1978, and on each and every Monday thereafter, until further orders of this Court, the plaintiff, Robert Michael Fungaroli, pay to the Forsyth County Clerk of Court, for the support of Judith Diane Fungaroli, alimony pendente lite in the amount of $100.00 per week.

DATED this the 1st day of March, 1978.

/s/ Gary G. Tash
DISTRICT COURT JUDGE

APPENDIX B

No. 7821DC442

NORTH CAROLINA COURT OF APPEALS

Filed: 20 March 1979

ROBERT MICHAEL FUNGAROLI

v. Forsyth County
No. 77CVD4340

JUDITH DIANE FUNGAROLI

Appeal by plaintiff from Tash, Judge, and Freeman, Judge. Orders entered 1 March 1978 and 7 March 1978 in District Court, Forsyth County. Heard in the Court of Appeals 5 February 1979.

On 21 December 1977, plaintiff sued for custody of the minor child of plaintiff and defendant. On the same date, plaintiff was granted custody by an ex parte court order. On 18 February 1978, another ex parte order allowed defendant visitation privileges with the child. Still another ex parte order was issued 24 February 1978 for plaintiff to show cause why he should not be punished for contempt for violation of the order of visitation. Defendant answered 28 February 1978, counterclaiming for alimony and child custody. On 1 March 1978, defendant filed motion for alimony pendente lite and on that date a hearing was conducted, and plaintiff was ordered to pay alimony pendente lite to defendant. A hearing on the contempt order was held 6 March 1978, and plaintiff was adjudged to be in contempt. Plaintiff appealed from the orders of 1 March 1978 and 7 March 1978.

Morrow, Fraser & Reavis, by John F. Morrow, for plaintiff appellant.



Stephens, Peed & Brown, by B. Ervin Brown, II, for defendant appellee.

MARTIN (Harry C.), Judge.

Plaintiff first argues the alimony order is invalid as plaintiff was not given notice of the hearing. Defendant's counterclaim for alimony was filed 28 February 1978. At that time, plaintiff had already left the state of North Carolina with the minor child of the parties. On 21 February 1978, an order was issued by the Juvenile and Domestic Relations Court of Fairfax County, Commonwealth of Virginia. This order stated plaintiff and the child were living at 7225 Braddock Road, Springfield, Virginia 22151. The petition of plaintiff in the Virginia court, filed 21 February 1978, alleged under oath that plaintiff and the child lived in Springfield, Virginia.

The trial court, in its order of 1 March 1978, found as facts that plaintiff had left the state of North Carolina, taking with him the child of the parties; plaintiff had not supported defendant in any way since 21 December 1977; plaintiff was gainfully employed, being the co-owner of Ridgetop Records in Winston-Salem; that defendant has no income at all and no residence. The evidence before the court supported the findings of fact. These findings of fact support the conclusions of law by the court that plaintiff had abandoned defendant and left the state of North Carolina; that plaintiff was the supporting spouse and defendant the dependent spouse. Where the supporting spouse abandons the dependent spouse and leaves the state, notice of hearing on motion for alimony pendente lite is not required. N.C. Gen. Stat. 50-16.8; Barker v. Barker, 136 N.C. 316, 48 S.E. 733 (1904). Plaintiff argues that where a party has counsel of record, notice is required to be given to counsel, even though the party has left the state. In Barker, supra, the facts are similar to this case. Plaintiff husband

brought the action for divorce, defendant wife counterclaimed for alimony pendente lite, plaintiff husband left the state, and went to Hot Springs, Arkansas. Plaintiff had counsel of record. Section 1291 of the Code in effect in 1904 was substantially identical to the notice provision now found in N.C.G.S. 50-16.8. The Court held in Barker that notice of hearing was not required.

Service on an attorney of record is service on a party for the reason that the attorney is the agent of the party. If service is not required to be made on a party, it is not necessary to serve his attorney. N.C. Gen. Stat. 1A-1, Rule 5.

Plaintiff by his own conduct eliminated the necessity of service upon him by the notice. The assignment of error is overruled.

Plaintiff contends that the trial court's findings of fact and conclusions of law are insufficient. Plaintiff argues the court failed to find the existence of a marital relationship between plaintiff and defendant. Both plaintiff and defendant allege they are married to each other. This is a judicially established fact and is not required to be stated by the court. The findings of fact and conclusions of law by the court are sufficient to support the order for temporary alimony. Plaintiff failed to appear for the hearing and presented no evidence as to his expenses or income. The order of 1 March 1978 was in accord with N.C.G.S. 50-16. Eudy v. Eudy, 288 N.C. 71, 215 S.E.2d 782 (1975). The assignment of error is overruled.

Plaintiff argues the court erred in not continuing the 6 March 1978 contempt hearing. Plaintiff's counsel says he had been employed only thirty minutes and was not prepared for the hearing. Plaintiff had notice of the contempt hearing. Notice was mailed to plaintiff and his then counsel, G. Edgar Parker, on 24 February 1978. On 3 March 1978,



plaintiff discharged Parker as his attorney. The court allowed Parker to withdraw as attorney on 6 March 1978. Plaintiff had sufficient time to employ new counsel. The record indicates plaintiff was in Forsyth County on the day of the hearing. He contacted attorney Leslie G. Frye of the Forsyth County bar about 10:00 a.m. Plaintiff was referred to attorney John F. Morrow. He was able to talk with Morrow about 1:30 p.m. Yet plaintiff did not appear in court for the hearing.

Motions for continuance are addressed to the sound discretion of the trial court. They are not favored, and the party seeking a continuance bears the burden of showing sufficient grounds. N.C. Gen. Stat. 1A-1, Rule 40(b); Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976). Attorney Morrow made a statement in argument of his motion to continue, but failed to offer any evidence in support of his motion. The trial court had before it the evidence set out above. The chief consideration to be weighed in passing upon the motion to continue is whether the grant or denial will be in furtherance of substantial justice. Id. Plaintiff contends he was prejudiced by the denial of the continuance. Although he made an exception to the entry of the order of 7 March 1978 holding plaintiff in contempt, plaintiff does not attempt to argue any error in his brief with respect to that order. Plaintiff thereby abandoned the execption to the order. Rule 28(a), North Carolina Rules of Appellate Procedure; State v. Wilson, 289 N.C. 531, 223 S.E.2d 311 (1976). We hold the court properly denied plaintiff's motion to continue.

The orders of 1 March 1978 and 7 March 1978 are

Affirmed.

Chief Judge MORRIS and Judge CARLTON concur.

APPENDIX C

No. 29 TWENTY-FIRST DISTRICT

SUPREME COURT OF NORTH CAROLINA

Fall Term 1979

**********

ROBERT MICHAEL FUNGAROLI )
)
v. ) AMENDED JUDGMENT DISMISSING APPEAL ON MOTION OF DEFENDANT
)
JUDITH DIANE FUNGAROLI ) (7821DC442)

**********

This matter came on to be considered upon plaintiff's notice of appeal from the North Carolina Court of Appeals pursuant to G. S. 7A-30, and the defendant's motion to dismiss the appeal of the defendant for lack of substantial constitutional question; upon consideration whereof, it is adjudged by the Court in conference this 5th day of June, 1979, that the motion to dismiss the appeal be allowed, and that it be so certified to the North Carolina Court of Appeals.

It is considered and adjudged further that Plaintiff do pay the sum of NINE AND NO/100 DOLLARS ($9.00) and execution issue therefor.

s/ Brock, J.
For the Court

The foregoing order is issued over my hand and the seal of the Supreme Court this 13th day of June, 1979.

s/ John R. Morgan
John R. Morgan



Clerk of the Supreme Court
of North Carolina

cc: North Carolina Court of Appeals
Morrow, Fraser & Reavis, Attorneys at Law
Stephens, Peed & Brown, Attorneys at Law

APPENDIX D

IN THE SUPREME COURT OF THE
STATE OF NORTH CAROLINA

ROBERT MICHAEL FUNGAROLI, )
Appellant )
)
vs. ) No. 7821DC442
)
JUDITH DIANE FUNGAROLI, )
Appellee )

---

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES:

NOTICE IS HEREBY GIVEN that Robert Michael Fungaroli, the appellant named above, hereby appeals to the Supreme Court of the United States from the amended judgment of the Supreme Court of North Carolina dismissing the appeal of appellant for lack of a substantial constitutional question entered in this civil action on June 13, 1979.

This appeal is entered pursuant to 28 U.S. C. 1257 (2)(3).

s/ John F. Morrow
John F. Morrow,
Attorney for appellant
Suite 325, NCNB Plaza
Winston-Salem, North Carolina 27101
919/722-9511

---

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing Notice of Appeal to the Supreme Court

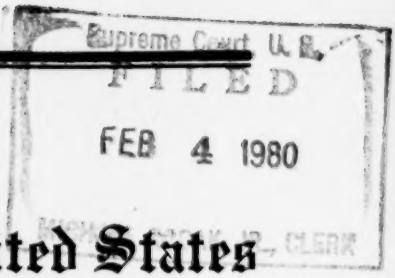


of the United States on B. Ervin Brown, II, attorney for appellee, by placing said copy in a postpaid envelope addressed to said attorney at Suite 315, NCNB Plaza, Winston-Salem, North Carolina 27101, which is his last known address, and by placing said envelope and its contents in the United States Mail at Winston-Salem, North Carolina, on September 4, 1979.

s/John F. Morrow
John F. Morrow,
Attorney for appellant
Suite 325, NCNB Plaza
Winston-Salem, North Carolina 27101
919/722-9511

Filed: September 4, 1979

APPENDIX




IN THE

# Supreme Court of the United States

OCTOBER TERM 1979

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NO. 79-492

---

ROBERT MICHAEL FUNGAROLI,

.....Appellant

V.

JUDITH DIANE FUNGAROLI,

.....Appellee

---

ON APPEAL FROM THE NORTH CAROLINA
COURT OF APPEALS

---

FILED SEPTEMBER 11, 1979
PROBABLE JURISDICTION NOTED JANUARY 14, 1980

APPELLATE PRINTING SERVICES, INC., HERITAGE BLDG., RICHMOND, VA. (804) 643-7789

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## RELEVANT DOCKET ENTRIES

Complaint, filed December 21, 1977

Order of temporary custody dated December 21, 1977

Order of continuance dated January 9,1978

Order allowing defendant (appellee) visitation rights, dated February 18, 1978

Affidavit of defendant (appellee) with attachments, filed February 24, 1978

Order to show cause, dated February 24, 1978

Answer and counterclaim, filed February 28, 1978

Defendant's (appellee's) affidavit of financial standing, filed March 1, 1978

Motion for alimony pendente lite and attached affidavit, filed March 1, 1978

Hearing on temporary alimony held March 1, 1978

Order for temporary alimony, dated March 1, 1978

Order allowing G. Edgar Parker to withdraw, dated March 6, 1978

Hearing on show cause order held March 6, 1978

Order for arrest dated March 7, 1978

Appeal entries from alimony order, dated March 8, 1978

Appeal entries from order of arrest, dated March 8, 1978

Opinion of North Carolina Court of Appeals filed March 20, 1979

Amended Judgment Dismissing Appeal on Motion of Defendant filed June 13, 1979, in North Carolina Supreme Court



IN THE GENERAL COURT OF JUSTICE

DISTRICT COURT DIVISION

NORTH CAROLINA )
)
FORSYTH COUNTY )

ROBERT MICHAEL FUNGAROLI)
)
Plaintiff )
)
vs. ) COMPLAINT
)
JUDITH DIANE FUNGAROLI, )
)
Defendant )

---

The plaintiff, complaining of the defendant, alleges and says:

I.

That the plaintiff and defendant are citizens and residents of the County of Forsyth, State of North Carolina; that the plaintiff has been a resident of Forsyth County, North Carolina for more than six months next preceding the commencement of this action.

II.

That the plaintiff and defendant were lawfully married on the 3rd day of May, 1977.

III.

That there was one child born to the marriage, to-wit: Derek Cassidy Fungaroli, born March 19, 1977. That the plaintiff is in all respects a fit and proper person to have the care, custody, and control of the minor child and that the defendant is not in anywise fit, proper or suitable to have the custody of said child. Defendant has had a mental illness which has recurred frequently in the past 4 to 5 years and the mental illness has again occurred within the past 2 months; that for the past 2 months, defendant has experienced severe personality changes and fluctuates between a love-hate personality; that during said period of



time defendant has often had no control over herself; that during this period of time defendant has had to be constantly medicated with psychiatric drugs; that plaintiff signed a petition to have defendant committed on or about December 6, 1977, for the reasons that defendant was throwing the telephone and acting violently, that defendant has threatened the lives of the plaintiff and plaintiff's relatives, that defendant was having delusions and was talking about seeing faces in the walls of her house of various relatives, and that defendant neglected the minor child in that she was not adequately feeding the child and rarely changing the child; that a hearing was held before Forsyth County District Court Judge on or about December 14, 1977, and defendant was released; that since the release, the defendant has continued to experience the above mentioned

symptoms; that on or about December 15, 1977, the defendant was found at a diner in Kernersville and plaintiff was informed by a Sheriff that she was having delusions, and that she did not know where she lived; that the defendant has again been committed and is scheduled to have another committment hearing on December 21, 1977.

WHEREFORE, plaintiff respectfully prays the Court:

(1) That this verified complaint be taken as an Affidavit in the cause;

(2) That plaintiff be awarded the care, custody and control of the minor child born of his marriage to the defendant;

(3) That an order be signed giving plaintiff immediate custody of the minor child pending a hearing in this matter;



(4) For such other and further relief as to the Court may seem just and proper.

WHITE AND CRUMPLER

ATTORNEYS FOR PLAINTIFF

By /s/ G. Edgar Parker

G. Edgar Parker

2616 Wachovia Building

Winston-Salem, North Carolina

(919) 725-1304

(Verification omitted in printing)

IN THE GENERAL COURT OF JUSTICE

DISTRICT COURT DIVISION

(Title omitted in printing)

ORDER

THIS CAUSE coming on to be heard and being upon Motion by plaintiff for an Order allowing plaintiff to have the temporary custody of Derek Cassidy Fungaroli pending the service of process and notice upon the defendant and until a hearing is had in this matter;

And it appearing to the Court by the verified Complaint and Affidavit in this cause that the circumstances in this case render such an Order appropriate;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff have the temporary care, custody and control of Derek Cassidy Fungaroli until such time as the defendant is served with process and notice of hearing and until a



hearing is had in this matter; and that the defendant be restrained and ajoined (sic) from removing the said minor child from the County of Forsyth, State of North Carolina.

This the 21st day of December,1977.

/s/ Gary B. Tash
JUDGE PRESIDING

IN THE GENERAL COURT OF JUSTICE

DISTRICT COURT DIVISION

(Title omitted in printing)

ORDER

THIS CAUSE coming on to be heard and being heard on the 9th day of January, 1978, before the undersigned Judge Presiding;

AND IT APPEARING to the Court that defendant is presently an inpatient in the psychiatric unit at Forsyth Memorial Hospital, and for this reason, the undersigned judge is not willing to proceed with the hearing on this date and the matter should be continued.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the hearing scheduled for January 9, 1978, be and the same is hereby, continued until the 23 day of January, 1978, at 9:30 o'clock A. M., or as soon thereafter as the matter



can be heard.

This the 9th day of January, 1978.

/s/ William H. Freeman
JUDGE PRESIDING

IN THE GENERAL COURT OF JUSTICE

DISTRICT COURT DIVISION

(Title omitted in printing)

ORDER

This matter comes before the Court upon defendants oral motion for reasonable visitation rights with her minor child, Derek Cassidy Fungaroli, born May 19, 1977. Based upon the Court's reading of the verified pleadings herein, and the oral representations of counsel for defendant, it is hereby

ORDERED that the plaintiff allow the defendant, in the presence of her mother, to visit with the minor child at the home of the plaintiff, 317 Lucinda Lane, Kernersville, North Carolina, on Sunday, February 19, 1978, from 1 until 6 p.m., and on Wednesday, February 22, 1978, from 6 until 8 p.m.

And it is further ORDERED that



plaintiff allow the defendant to visit with the said minor child for a like period of time on each and every Sunday and Wednesday thereafter until further order of this court.

Dated: February 18, 1978.

/s/ Gary B. Tash
District Judge

IN THE GENERAL COURT OF JUSTICE

DISTRICT COURT DIVISION

(Title omitted in printing)

A F F I D A V I T

Judith Diane Fungaroli, first being duly sworn deposes and says:

1. I am the defendant in this action.

2. My husband, Robert Michael Fungaroli, has not permitted me to visit with my minor child, Derek, in the presence of my mother or otherwise at 317 Lucinda Lane, Kernersville, North Carolina on Sunday, February 19, 1978, on Wednesday, February 22, 1978 or any other time or place since February 18, 1978.

3. I am informed and believe that my husband, Robert M. Fungaroli has left the state and is presently living in Springfield, Virginia.

4. I have, today, received by certified mail a summons and petition from



the Juvenile and Domestic Relations Court of Fairfax County, Virginia, copies of which are attached to this Affidavit as Exhibit A and B.

Further the affiant sayeth not.

/s/ Judith Diane Fungaroli
AFFIANT

(Jurat omitted in printing)

(Certificate of Service omitted in printing)

(EXHIBIT A)

COMMONWEALTH OF VIRGINIA

TO ANY SHERIFF OR POLICE OFFICER OR

---

I COMMAND YOU, in the name of the Commonwealth of Virginia, that you summon the below-named parties listed to appear in person before the Juvenile and Domestic Relations District Court of the City/County of Fairfax at the date, place and time specified below to re-

spond to the allegations in the attached petition.

Child's Name:

Derek Fungaroli

Child's Address:

7225 Braddock Road, Springfield,Va.22151

Father's Name and Address:

Robert M. Fungaroli, Same as Child's

Mother's Name and Address:

Judith D. Fungaroli 14 Devonshire St., Winston Salem, North Carolina 27103

Time of Appearance

Month: March Day: 22nd Year: 1978

Time: 1:30 P.M.

Court's Street Address And Telephone:

4000 Chain Bridge Rd. Fairfax, Va.22030 691-2335 Room 107

A hearing will be held to determine whether the said child should be dealt with according to the provisions of the Juvenile and Domestic Relations



District Court Law.

In this execution you shall in no wise omit any named person and make return of this summons as provided by law.

Given under my hand this 21st day of February,1978.

/s/Marjorie Danzig
Deputy Clerk

(EXHIBIT B)

COMMONWEALTH OF VIRGINIA

THE JUVENILE AND DOMESTIC RELATIONS COURT OF THE CITY/COUNTY OF FAIRFAX

Child under eighteen years of age, to-wit:

| Child's Name: | Date of Birth: | Age: |
|---|---|---|
| Derek Fungaroli | 05/19/77 | 3 |

Sex:

M

Child's Address:

7225 Braddock Rd. Springfield, Va.22151

Father's Name and Address:

Robert M. Fungaroli Same as Child's

Mother's Name and Address:

Judith D. Fungaroli 14 Devonshire St.

Winston Salem, North Carolina 27103

The undersigned petitioner represents to the Court to the best of his/her knowledge, information and belief that the above named child is within the purview of the Juvenile and Domestic Relations District Court that Law, within this city/county, the child:

His custody is a subject of controversy between his parents, who live apart.

(16.1-241 A (3) )

That information in the following items is not known to the petitioner:

---

NOW, THEREFORE, your Petitioner prays: That proper process issue; That said child and the persons having his



custody and control be summoned to appear before this Court; and That this Court enter such orders and judgments as the Court deems fit and proper in accordance with the law and which will serve the purpose and interest of the Juvenile and Domestic Relations District Court Law.

February 21, 1978
Date

/s/ Richard Colten
Petitioner's Signature

Attorney Richard Colten on behalf of Robert M. Fungaroli, Father
Petitioner's Name

University Dr. Fairfax, Va. 22030
Petitioner's Address

(Jurat omitted in printing)

IN THE GENERAL COURT OF JUSTICE

DISTRICT COURT DIVISION

(Title omitted in printing)

O R D E R

THIS CAUSE, coming on to be heard ex parte upon defendant's motion to show cause filed this day, and it appearing to the court from the record herein and from the affidavit of defendant, filed with her motion, that this Court should enter an Order requiring plaintiff to appear and show cause as set forth in said motion;

NOW, THEREFORE, It is ORDERED that plaintiff, Robert M. Fungaroli, appear before the Forsyth County District Court at its Civil Session on the 6th day of March, 1978 at 9:30 o'clock a.m. and show cause why he should not be held in contempt of this Court for violation of the Order entered herein on February 18,



1978. And it is further ORDERED that plaintiff bring with him to the Court on March 6, 1978, the minor child, Derek Fungaroli.

This 24th day of February, 1978, at 4:15 o'clock p.m.

/s/ William H. Freeman
DISTRICT COURT JUDGE

(Certificate of Service omitted in printing)

IN THE GENERAL COURT OF JUSTICE

DISTRICT COURT DIVISION

(Title omitted in printing)

ANSWER AND COUNTERCLAIM

---

The defendant, answering the Complaint of the plaintiff, alleges and says:

I. The allegations contained in paragraph one of the Complaint are admitted.

II. The allegations contained in paragraph two of the Complaint are denied, the true fact being that plaintiff and defendant were lawfully married on the 3rd day of March, 1977.

III. As to the allegations contained in paragraph three of the Complaint, it is admitted: That there was one child born to the marriage, to-wit: Derek Cassidy Fungaroli, born May 19, 1977; that plaintiff signed a Petition to have



defendant committed on or before December 6, 1977, and that at that time defendant was in fact having delusions; that a hearing was held before a Forsyth County District Court Judge on or about December 14, 1977 and defendant was released; that on or about December 15, 1977, defendant was found at a diner in Kernersville; that the defendant was committed involuntarily pursuant to an Order of this Court dated December 21, 1977, to Forsyth Memorial Hospital for a period not to exceed 90 days.

Except as hereinabove admitted, the allegations contained in paragraph three of the Complaint are denied.

AND AS FURTHER ANSWER TO THE COMPLAINT HEREIN, AND BY WAY OF COUNTERCLAIM, THE DEFENDANT ALLEGES AND SAYS:

FIRST COUNT

I. That the defendant is in all

respects a fit and proper person to have the care, custody, and control of the said minor child, and that the plaintiff is not a fit, proper or suitable person to have custody of the said minor child.

SECOND COUNT

I. That on or about December 21, 1977, at which time defendant was appearing before the District Court in response to plaintiff's Petition for Involuntary Committment, and at which time plaintiff knew, or should have known, that defendant was incapable of understanding the allegations of the instant Complaint,and at which time plaintiff knew, or should have known, that, given defendant's mental condition, service upon defendant of the instant Complaint would further exacerbate defendant's illness, plaintiff nevertheless attempted to serve the defendant with the Summons and Complaint



in the instant action.

II. That on or about the first week of January, 1978, defendant was granted a pass by her doctors at Forsyth Memorial Hospital for the purpose of returning home to visit plaintiff and her infant child. Upon returning home, plaintiff refused to allow defendant to visit with her infant child, and in fact forced defendant, her mother, and other relatives to leave the home, and not to return.

III. That subsequent to plaintiff's involuntary hospitalization on December 21, 1977, the plaintiff has visited with the defendant no more than three times, and at no time has the plaintiff provided the defendant with any subsistence in any form.

IV. That on or about May 19, 1977, plaintiff, at the time of the birth of

defendant's infant son, had engaged in such excessive use of marijuana as to almost cause defendant to lose her child, which child was born at the home of the parties.

V. That upon information and belief, plaintiff is the co-owner of Ridgetop Records and is, therefore, gainfully employed; defendant is presently unemployed and has no income from any source whatsoever. Plaintiff is, therefore, a supporting spouse and defendant is a dependent spouse within the meaning of N.C. G.S. §50-16.1(3),(4).

VI. Based on those facts set forth in Paragraphs I through V of the Second Count of defendant's counterclaim, defendant is entitled to alimony, alimony pendente lite, and reasonable attorney's fees from plaintiff, pursuant to the provisions of N.C.G.S. §50-16.2 (4), (5),



(7), (9), (10), N.C.G.S. §50-16.3, and N.C.G.S. 50-16.8.

NOW WHEREFORE, the defendant respectfully prays the Court as follows:

1. That plaintiff's Complaint be dismissed;

2. That defendant be awarded custody of the minor child, Derek Cassidy Fungaroli;

3. That defendant have and recover of plaintiff alimony, alimony pendente lite, and reasonable attorney's fees, in a reasonable amount or amounts to be determined by the Court;

4. That the costs of this action be taxed against the plaintiff; and

5. For such other and further relief as the interest of justice may require.

LEGAL AID SOCIETY OF NORTH-
WEST NORTH CAROLINA
202 West Third Street
Winston-Salem, North Carolina
27101
(919) 725-9166

BY: /s/ Bertram Ervin Brown,II
BERTRAM ERVIN BROWN, II
Attorney for defendant

(Certificate of Service omitted in printing)



IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
(Title omitted in Printing)

AFFIDAVIT OF FINANCIAL STANDING
OF PARTY SEEKING SUPPORT

JUDITH DIANE FUNGAROLI, the defendant herein having been first duly sworn as to the truthfulness and completeness of this affidavit deposes and says that she has income from the following sources and none other;

| | MONTH | YEAR |
|---|---|---|
| Gross Wages | 0 | 0 |
| (if weekly or biweekly round off to monthly) | | |
| Federal Withholding | | |
| State withholding | | |
| Social Security | | |
| Retirement | | |
| Loans | | |
| Others(Specify) | | |

| | | |
|---|---|---|
| Net Wages | 0 | 0 |
| Business Profit | | |
| Commission | | |
| Overtime | | |
| Interest | | |
| Dividends | | |
| Trust Fund | | |
| Social Security | | |
| Pension | | |
| Rent | | |
| Other (Itemize) | | |
| TOTAL INCOME | | |
| Other Assets (Stocks, Bonds, Savings Accounts, Real Estate, Etc.) | 0 | 0 |

That my pay period is:

Weekly N/A

Bi-Weekly ____

Twice Monthly ____



Monthly ____

Other ____

If answer is yes then list specifically and in detail on separate sheet. That I have ___ have not ___ received substantially the same amount of income for the past twelve months.

That if I have not received substantially the same amount I did receive (explain how much and why):

That I have ___, have not ___, received substantially the same amount of income for the past three years.

That if I have not received substantially the same amount I did receive (explain how much and why a greater or lesser sum):

That my expenses while living separate and apart from my spouse are monthly as follows (if all payments are not made by the month, figure the average monthly costs for each):

| | MONTHLY TOTAL |
|---|---|
| Food at home | $ 120.00 |
| Food away from home | ------- |
| Household supplies | 100.00 |
| Auto Payment | ------- |
| Support for children not living with affiant | ------- |
| Utilities: Heating | 30.00 |
| Water | 6.00 |
| Electric | 40.00 |
| Gas for Auto | 50.00 |
| Repairs for Auto | ------- |
| Other Transportation Costs | ------- |
| Grooming | 10.00 |
| Clothing | 50.00 |
| Laundry and Dry Cleaning | 25.00 |
| Recreation | 40.00 |
| Medical(including doctor's, hospital, dentists, drugs, not paid by insurance) | 60.00 |
| Reading materials | ------ |



| | |
|---|---|
| Tobacco & Alcohol | -------- |
| Club dues & expenses | -------- |
| Rent | -------- |
| Household & yard maintenance | 200.00 |
| Cable T.V. | ------ |
| Church Pledge | ------ |
| Educational | ------ |
| Gifts | ------ |
| Other (Itemize) | ------ |
| TOTAL BALANCE DUE | ------ |
| House Payments: | |
| 1st Mtg. | |
| 2nd Mtg. | |
| 3rd Mtg. | |
| Insurance: | |
| Car | |
| Life | |
| Hospital | |
| Other | |

Debt payments (if the following are not represented elsewhere in this affidavit

specify)

Master charge _____

Bank reserve _____

Credit reserve _____

Department Stores _____

Other (itemize) _____

MONTHLY TOTAL _____

That I am employed at (unemployed) and have been so employed since _____. That I was employed at _____ prior to where I am now employed.

That I have ____, do not have __x__, other employment. If have it checked yes, my other employment is at _____.

That this petitioner needs for her own support from the respondent the sum of $731.00 monthly; $182.75 weekly.

/s/Judith Diane Fungaroli
AFFIANT

(Jurat omitted in printing)



IN THE GENERAL COURT OF JUSTICE

DISTRICT COURT DIVISION

(Title omitted in printing)

MOTION FOR ALIMONY PENDENTE LITE AND ATTORNEYS FEES

NOW COMES defendant in the above-captioned action, through counsel, pursuant to the provisions of N.C.G.S. §§50-16.3, 50-16.4 and 50-16.8(f), and moves the Court for an Order requiring plaintiff to pay her alimony pendente lite in the amount of $100.00 per week, and for attorneys fees in the amount of $50.00 per week. This motion is based upon the defendant's verified Answer and Counterclaim, and her Affidavit which is attached hereto.

Respectfully submitted this the 1 day of March, 1978.

LEGAL AID SOCIETY OF NORTH-
WEST NORTH CAROLINA, INC.
202 West Third Street
Winston-Salem, North Carolina
27101
(919) 725-9166

BY: /s/Bertram Ervin Brown,II
BERTRAM ERVIN BROWN, II
Attorney for defendant



AFFIDAVIT

NOW COMES the affiant, Judith Diane Fungaroli, and being duly sworn, deposes and says:

1. My name is Judith Diane Fungaroli, and I am the defendant in an action captioned Fungaroli vs. Fungaroli, File No. 77 CVD 4340.

2. On or about the 16th day of February, 1978, I was discharged from St. Albans Hospital, Radford, Virginia. Upon returning to my house at 317 Lucinda Lane, Kernersville, North Carolina, I discovered that my husband, Robert Michael Fungaroli, had changed the locks on the doors of the house and that I was unable to gain access to the same.

3. I am presently unemployed and have no income from any source whatsoever. I am presently living in the home of a relative in Winston-Salem, North Carolina.

4. On February 18, 1978, the Court in the above-mentioned action signed an Order requiring my husband to allow me to visit with my minor child, Derek Cassidy Fungaroli. As shown by the Order of this Court dated February 24, 1978, my husband, the plaintiff, has failed to comply in all respects with the visitation Order dated February 18, 1978.

5. On or about February 24, 1978, I received by certified mail a Summons and Petition filed by my husband in the Juvenile and Domestic Relations Court of Fairfax County, Virginia, the purpose of said Petition being to obtain permanent custody of my minor child.

Further, the affiant sayeth naught.

/s/Judith Diane Fungaroli
JUDITH DIANE FUNGAROLI

(Jurat omitted in printing)



IN THE GENERAL COURT OF JUSTICE

DISTRICT COURT DIVISION

| | |
|---|---|
| ROBERT MICHAEL FUNGAROLI, Plaintiff vs. JUDITH DIANE FUNGAROLI, Defendant | ORDER |

THIS MATTER comes before the Court on the Motion of defendant for alimony pendente lite and for attorneys fees. It appearing to the Court that the plaintiff has left the State of North Carolina, no notice was given of defendant's Motion, and, in the opinion of the Court, none is required pursuant to the provisions of N.C.G.S. §50-16.8(e). The Court having considered the verified Complaint, the verified Answer and Counterclaim, and the Affidavit of defendant, and being otherwise fully advised in the premises, does hereby make the following

FINDINGS OF FACT

1. That the plaintiff, Robert Michael Fungaroli, has left the State of North Carolina and is living presently in Springfield, Virginia.

2. That the plaintiff, Robert Michael Fungaroli, left the State of North Carolina, and carried with him the minor child, Derek Cassidy Fungaroli, after he had filed the instant action, and after the defendant had answered and counterclaimed for alimony, alimony pendente lite, and custody of the minor child, and after this Court had entered an Order herein dated February 18, 1978, requiring the plaintiff to allow the defendant to visit with her minor child, Derek Cassidy Fungaroli.

3. That the defendant is presently unemployed and has been unemployed each and every day subsequent to her hospitali-



zation which commenced on December 21, 1977, and ended on February 16, 1978; that the defendant has no income from any source whatsoever at the present time, and has no residence of her own other than that being presently provided on a temporary basis by her relatives.

4. That the plaintiff is the co-owner of a partnership, Ridgetop Records, located in the City of Winston-Salem, North Carolina, and is therefore gainfully employed.

5. That at no time subsequent to December 21, 1977, has the plaintiff provided the defendant with any subsistence in any form.

6. That commencing on or about the first week of January, 1978, and continuing up to and including the present date, the plaintiff has wilfully obstructed defendant in her attempts to return to

her home at 317 Lucinda Lane, Kernersville, North Carolina.

Based on the foregoing Findings of Fact, the Court hereby makes the following

CONCLUSIONS OF LAW

1. That the plaintiff is a supporting spouse and the defendant a dependant spouse within the meaning of N.C.G.S. § 50-16.1(3), (4).

2. That the plaintiff, Robert Michael Fungaroli, has abandoned the defendant, Judith Diane Fungaroli, and has maliciously turned the defendant out of doors.

3. That the plaintiff, Robert Michael Fungaroli, has offered such indignities to the person of the plaintiff, Judith Diane Fungaroli, as to render her condition intolerable and her life burdensome.



4. That the plaintiff, Robert Michael Fungaroli, has wilfully failed to provide the defendant, Judith Diane Fungaroli, with necessary subsistence according to his means and condition so as to render the condition of the defendant, Judith Diane Fungaroli, intolerable and the life of the defendant burdensome.

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED, ADJUDGED and DECREED:

1. That commencing on Monday, March 6, 1978, and on each and every Monday thereafter, until further orders of this Court, the plaintiff, Robert Michael Fungaroli, pay to the Forsyth County Clerk of Court, for the support of Judith Diane Fungaroli, alimony pendente lite in the amount of $100.00 per week;

DATED this the 1st day of March, 1978.

/s/Gary B. Tash
DISTRICT COURT JUDGE

IN THE GENERAL COURT OF JUSTICE

DISTRICT COURT DIVISION

(Title omitted in printing)

O R D E R

THIS CAUSE coming on to be heard and being heard before the undersigned Judge Presiding over the Forsyth County Civil District Court upon Motion of G. Edgar Parker of the firm of White and Crumpler to allow the said G. Edgar Parker to withdraw as counsel for the plaintiff;

And it appearing to the Court that the plaintiff by a letter of March 3, 1978 discharged G. Edgar Parker as his attorney of record and stated that he no longer desired that G. Edgar Parker represent him in this case.

And it appearing to the Court that G. Edgar Parker should be allowed to withdraw as attorney for plaintiff and that



this Motion should be allowed.

NOW, THEREFORE, it is, ORDERED, ADJUDGED AND DECREED that G. Edgar Parker of the firm of White and Crumpler be and he is hereby allowed to withdraw as attorney of record for the plaintiff in this case.

This the 6th day of March, 1978.

/s/William H. Freeman
Judge Presiding

IN THE GENERAL COURT OF JUSTICE

DISTRICT COURT DIVISION

(Title omitted in printing)

ORDER FOR ARREST

This matter coming before the Court pursuant to the Order of the Court entered February 24, 1978, requiring the plaintiff, Robert Michael Fungaroli, to appear and show cause, if any there be, why he should not be held in contempt of this Court for violation of the Order entered herein on February 18, 1978, and further ordering the plaintiff to bring with him the minor child, Derek Cassidy Fungaroli, and the plaintiff failing to appear this date, the Court hereby makes the following

FINDINGS OF FACT:

1. That on February 18, 1978, this Court entered an Order requiring the plaintiff to allow the defendant to visit with her minor child on Sunday, February 19,



1978, and on Wednesday, February 22, 1978, and on each and every Sunday and Wednesday thereafter until further order of this Court.

2. That at no time subsequent to February 18, 1978, has the plaintiff complied in any respects with the Order of this Court of the same date.

3. That the plaintiff has fled to the state of Virginia for the sole purpose of obstructing the Order of this Court dated February 18, 1978.

Based on the forgoing findings of fact, the court hereby concludes as a matter of law that the plaintiff, Robert Michael Fungaroli, is in civil and criminal contempt as a result of his failure to comply with the Order of this Court dated February 18, 1978, and Order of this Court dated February 24, 1978.

NOW, THEREFORE, it is ORDERED, AD-

JUDGED and DECREED as follows:

1. That the sheriff of Forsyth County, or the sheriff of any other county of this state, arrest the said Robert Michael Fungaroli, and take him into custody until such time as he complies with the Order of the Court dated February 18, 1978.

2. It is FURTHER ORDERED that, as a result of the plaintiff's criminal contempt in wilfully obstructing the Orders of this Court, he is fined the sum of Five Hundred Dollars ($500.00).

3. and be it FURTHER ORDERED that the plaintiff may purge himself of both civil and criminal contempt by personally appearing before this Court on or before March 20, 1978.

Entered this the 7th day of March, 1978.

/s/William H. Freeman
DISTRICT COURT JUDGE



IN THE GENERAL COURT OF JUSTICE

DISTRICT COURT DIVISION

(Title omitted in printing)

APPEAL ENTRIES

---

Plaintiff gave due notice of appeal to the Court of Appeals.

Appeal bond in the sum of $200.00 is adjudged to be sufficient.

Plaintiff is allowed 45 days in which to serve proposed record on appeal, and defendant is allowed 30 days thereafter within which to serve objections or a proposed alternative record on appeal.

This the 8th day of March, 1978.

/s/Gary B. Tash
Judge Presiding

IN THE GENERAL COURT OF JUSTICE

DISTRICT COURT DIVISION

(Title omitted in printing)

APPEAL ENTRIES

---

Plaintiff gave due notice of appeal to the Court of Appeals.

Plaintiff is allowed 45 days in which to serve proposed record on appeal, and defendant is allowed 30 days thereafter within which to serve objections or a proposed alternative record on appeal.

This the 8th day of March, 1978.

/s/William H. Freeman
Judge Presiding



NORTH CAROLINA COURT OF APPEALS

Opinion of the North Carolina Court of Appeals, dated March 20, 1979, was printed as Appendix B to appellant's Jurisdictional Statement and can be found on page 4a of the Jurisdictional Statement.

SUPREME COURT OF NORTH CAROLINA

Amended Judgment Dismissing Appeal on Motion of Defendant, dated June 13, 1979, from the Supreme Court of North Carolina was printed as Appendix C to appellant's Jurisdictional Statement and can be found on page 8a of the Jurisdictional Statement.

## COUNSEL OF RECORD

Counsel for Appellant:

John F. Morrow
Morrow, Fraser and Reavis
Suite 325, NCNB Plaza
Winston-Salem, North Carolina 27101
919/722-9511

Counsel for Appellee:

B. Ervin Brown, II
Stephens, Peed and Brown
Suite 315, NCNB Plaza
Winston-Salem, North Carolina 27101
919/722-7126



## FILING AND MAILING CERTIFICATE OF PRINTER

I hereby certify that on this 4th day of February, 1980 I filed with the Clerk's Office of this Court the required copies of this document and further certify that I mailed this same date from Richmond, Va. the required copies to opposing counsel. The necessary filing and mailing was performed in accordance with the instructions given me by counsel in this case.

Catherine Johnson
Appellate Printing Services
Heritage Bldg.
10th & Main Sts.
Richmond, Virginia 23219

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1979

No. 79-492

ROBERT MICHAEL FUNGAROLI,

Appellant

vs.

JUDITH DIANE FUNGAROLI,

Appellee

---

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NORTH CAROLINA

---

# MOTION TO DISMISS APPEAL

---

B. Ervin Brown, II
Counsel for Appellee
STEPHENS, PEED & BROWN
Suite 315
NCNB Plaza
Winston-Salem, NC 27101

December 10, 1979

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1979

No. 79-492

ROBERT MICHAEL FUNGAROLI,

Appellant

vs.

JUDITH DIANE FUNGAROLI,

Appellee

---

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NORTH CAROLINA

---

MOTION TO DISMISS APPEAL

---

Appellee moves the Court to dismiss the Appeal herein on the following grounds:

I. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY THE APPEAL

The gist of the question presented to this Court for decision by Appellant is whether he was denied procedural due process when he was given neither notice nor opportunity to be heard before being Ordered to pay alimony pendente lite to the defendant, and that insofar as North Carolina General Statute §50-16.8 authorizes such a practice, it is unconstitutional as applied to him. Inasmuch as North Carolina General Statute §50-16.8, as applied to the facts of this case[1/] clearly authorized the District Judge to enter his Order without notice to the plaintiff, the sole question for decision by this Court is whether §50-16.8 is constitutional. Because of the narrow specificity with which it is drawn and applied, defendant contends that it is constitutional on its face and as applied in the action below.

While it cannot be denied that the right to be heard "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest", Mullane v. Central Hanover Bank and Trust Co., 399 U.S. 306, 314, 95 L.Ed. 865, 70 S.Ct. 652, it is equally true that summary procedures "may well meet the requirements of due process in extraordinary situations". Sniadach v. Family Finance Corp., 395 U.S. 337,23 L.Ed. 2d 349, 352, 89 S.Ct. 1820. Those extraordinary situations have been defined by this Court as follows:

> "First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of ligitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute that it was necessary and justified in the particular instance."

Funetes v. Sheven, 407, U.S. 67, 91, 32 L.Ed. 2d 556, 92. S. Ct. 1893. It is Appellee's contention that the North Carolina Legislautre, in choosing to treat a dependant spouse for whose benefit an Order for the payment of alimony or alimony pendente lite has been entered as a creditor, see N.C. General Statutes §50-16.7(e), (g), (h), and in carefully limiting when the supporting spouse shall not be entitled to notice to those situations enumerated in §50-16.8(e), the Legislature has acted in a constitutional fashion, and has complied with the test set forth above. Cf., Fuentes, supra, 407 U.S. at 94("There may be cases in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods. But the statutes before us are

---

1/ §50-16.8(e) provides that "[n]o order for pendente lite shall be made unless the supporting spouse shall have had five days notice thereof; but if the supporting spouse shall have abandoned the dependant spouse and left the State, or shall be in parts unknown, or is about to remove or dispose of his or her property for the purpose of defeating the claim of dependant spouse, no notice is necessary".[Emphasis Supplied]. The trial court thus found that no notice to plaintiff was required inasmuch as "plaintiff had left the State of North Carolina, taking with him the child of the parties; plaintiff had not supported defendant in any way since the 21st of December, 1977; plaintiff was gainfully employed, being the co-owner of Ridgetop Records in Winston-Salem; that defendant had no income at all and no residence". Fungaroli v. Fungaroli, 40 N.C.App. 397, 252 S.E.2d 849, 850(1979).

not narrowly drawn to meet any such unusual condition".); Sniadach, supra, 395 U.S. at 339([I]n the present action no situation requiring special protection to a State or creditor interest is presented by the facts; nor is the Wisconsin statute narrowly drawn to meet any such unusual condition"). (Emphasis added.) And see, Barber v. Barber, 136 N.C. 316, 48 S.E. 733(1904).

CONCLUSION

For the foregoing reasons it is the contention of the Appellee that the question presented in the jurisdictional statement of the Appellant does not represent a substantial constitutional question, and that this Court should, therefore, affirm the Judgment of the Appellate and Trial Courts below and dismiss the instant appeal.

Respectfully submitted, this the _____day of December, 1979.

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NORTH CAROLINA )
)
FORSYTH COUNTY )

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Motion to Dismiss on John F. Morrow, Esquire, Attorney for Appellant, placing said copy in a postpaid envelope addressed to said attorney at Suite 325, NCNB Plaza, Winston-Salem, North Carolina, 27101, which is his last known address, and by placing said envelope and its contents in the United States Mail at Winston-Salem, North Carolina, on December 10, 1979.

B. Ervin Brown, II
Counsel for Appellee

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

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NO. 79-492

---

ROBERT MICHAEL FUNGAROLI,

Appellant

V.

JUDITH DIANE FUNGAROLI,

Appellee

---

## BRIEF OF APPELLANT

---

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## JURISDICTION

This action is an appeal from a holding by the North Carolina Court of Appeals and North Carolina Supreme Court that a statute is constitutional under the Constitution of the United States of America. This appeal is brought forward under 28 U.S.C. sec. 1257 (2) and 1257 (3). The order of the District Court of Forsyth County is dated March 1, 1978; the opinion of the North Carolina Court of Appeals is dated March 20, 1979; the order of the North Carolina Supreme Court is dated June 13, 1979. Notice of Appeal was filed with the North Carolina Supreme Court on

September 4, 1979. Appeal was filed with the United States Supreme Court on September 11, 1979. Probable jurisdiction was noted January 14, 1980.

CONSTITUTIONAL PROVISIONS AND STATUTES

Amendment VI of the Constitution of the United States of America:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Amendment XIV, §1, of the Constitution of the United States of America:



"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

North Carolina General Statute §50-16.8 (Volume 2A, page 852)

§50-16.8. Procedure in actions for alimony and alimony pendente lite. -- (a) The procedure in actions for alimony and actions for alimony pendente lite shall be as in other civil actions except as provided in this action.

(b) Payment of alimony may be ordered:

(1) Upon application of the dependent spouse in an action by such spouse for divorce, either absolute or from bed and board; or

(2) Upon application of the dependent spouse in a separate action instituted for the purpose of securing an order for alimony without divorce; or

(3) Upon application of the dependent spouse as a cross action in a suit for divorce, whether absolute or from bed and board, or a proceeding for alimony without divorce, instituted by the other spouse.

(c) A cross action for divorce, either absolute or from bed and board, shall be allowable in an action for alimony without divorce.

(d) Payment of alimony pendente lite may be ordered:

(1) Upon application of the dependent



spouse in an action by such spouse for absolute divorce, divorce from bed and board, annulment, or for alimony without divorce; or

(2) Upon application of the dependent spouse as a cross action in a suit for divorce, whether absolute or from bed and board, annulment, or for alimony without divorce, instituted by the other spouse.

(e) No order for alimony pendente lite shall be made unless the supporting spouse shall have had five days' notice thereof; but if the supporting spouse shall have abandoned the dependent spouse and left the State, or shall be in parts unknown, or is about to remove or dispose of his or her property for the purpose of defeating the claim of the dependent spouse, no notice is necessary.

(f) When an application is made for alimony pendente lite, the party shall be

heard orally, upon affidavit, verified pleading, or other proof, and the judge shall find the facts from the evidence so presented.

(g) When a district court having jurisdiction of the matter shall have been established, application for alimony pendente lite shall be made to such district court, and may be heard without a jury by a judge of said court at any time.

(h) In any case where a claim is made for alimony without divorce, when there is a minor child, the pleading shall set forth the name and age of each such child; and if there be no minor child, the pleading shall so state.

QUESTION PRESENTED

Whether due process guarantees a litigant the right of notice and an opportunity to be heard and, further, whether North Carolina General Statute 50-16.8(e) (infra) which, inter alia, provides that



a judge may dispense with notice requirements and due process upon a finding that a litigant, i.e., a supporting spouse within the definition of North Carolina domestic relations law, has abandoned the State and whether the Court may then proceed to conduct a hearing affecting substantial property rights without notice to the alleged abandoning or fleeing spouse or to his attorney of record who has already made a general appearance in the case.

STATEMENT OF THE CASE

In the instant case, appellant filed a custody action under N.C.G.S. 50-13, et. seq., on December 21, 1977. (A p 3) On February 18, 1978, the trial court entered an ex parte order allowing the appellee specific visitation privileges. (A p 12) On February 24, 1978, the trial court entered an ex parte order that the

plaintiff show cause, if any there be, as to why he should not be punished as for contempt for violation of the order of February 18, 1978. (A p 20)

On February 28, 1978, the appellee filed answer and counterclaim for custody of the minor child pursuant to N.C.G.S. 50-13, et. seq., and for alimony pursuant to N.C.G.S. 50-16.1, et. seq. (A p 22) The next day, on March 1, 1978, the appellee filed a motion for alimony pendente lite and attorney's fees (A p 35); and a hearing was conducted on the same day on said motion, and appellant was ordered to pay temporary alimony. At the time of the hearing ordering temporary alimony, the answer and counterclaim of appellee had not been served upon appellant or his attorney of record. Furthermore, at the time of the temporary alimony hearing, neither the appellant nor his counsel of



record had been served with any notice of said hearing. The appellant appealed from this order and contended that the beforementioned constitutional rights under the Constitution of the United States and the Constitution of North Carolina were violated in that said appellant was not given proper notice and/or opportunity to be heard under the circumstances; that essential elements of "due process of law" and "law of the land" are notice and opportunity to be heard or defend in accordance with established rules which do not violate fundamental rights.

On March 6, 1978, a hearing was conducted on the ex parte show cause order arising out of the ex parte order allowing the appellee specific visitation privileges. Neither the appellant nor his counsel was given any notice of the ex parte order allowing said appellee specific visitation

privileges. The appellant appealed from the order entered March 6, 1978, finding him in contempt of said ex parte specific visitation privileges order and contended that his constitutional rights under the Constitution of the United States and Constitution of North Carolina were violated in the same manner and respect as stated in the preceding paragraph.

These constitutional issues were timely raised in the appeal to the North Carolina Court of Appeals. The appellant contends that the decision and order of the North Carolina Court of Appeals has not addressed itself in any manner to the constitutional issues as presented and that, if it is determined that the North Carolina Court of Appeals did address itself to said constitutional issues, the decision of the North Carolina Court of Appeals has erroneously ruled upon said issues.



## SUMMARY OF ARGUMENT

I.

North Carolina General Statute §50-16.8(e) is unconstitutional as a denial of due process of law because it enables a court, in certain circumstances, to enter a decree of alimony pendente lite against a supporting spouse without prior notice to the spouse or a meaningful opportunity to be heard. The fundamental guarantees of due process of law are that an individual cannot be deprived of a property interest by adjudication without first being notified and provided a meaningful opportunity to be heard. N.C.G.S. 50-16.8(e) ignores that injunction by dispensing with notice in any case where the dependent spouse alleges that the supporting spouse has abandoned the dependent spouse and left the state, or is in parts unknown, or is disposing of assets to defeat the claim of the dependent spouse for alimony. Failure

to give prior notice and opportunity for hearing, even in these situations, is not justified by any governmental or general public interests. Instead, it actively operates to the detriment of fair and informed decision-making. Finally, the infirmities of the statute are not cured by post-decree modification proceedings because the burden of proof is thereby shifted to the supporting spouse, and the burden of initiating the modification proceeding is placed on the supporting spouse as well.

II.

Even if N.C.G.S. 50-16.8(e) is a generally valid exercise of legitimate state power, its application to the appellant in this case is nevertheless unconstitutional as a denial of due process of law. Due process requires that litigants be provided reasonable notice in the cir-



cumstances, and in this case it would have been eminently reasonable to notify appellant's counsel of record or to notify appellant, whose location was known to the court and to the adverse parties.

ARGUMENT

I. N.C.G.S. 50-16.8(e) AUTHORIZING AN AWARD OF ALIMONY PENDENTE LITE WITHOUT ACCORDING TO THE SUPPORTING SPOUSE PRIOR NOTICE AND AN OPPORTUNITY TO BE HEARD, UPON MERE ALLEGATION THAT THE SUPPORTING SPOUSE HAS ABANDONED THE DEPENDENT SPOUSE AND LEFT THE STATE, VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

North Carolina provides for alimony pendente lite, or temporary alimony, to help support a dependent spouse through the course of litigation affecting marital and familial relationships. N.C.G.S. 50-16.3(a)(2) provides that a dependent spouse is entitled to alimony pendente lite when he or she establishes, by oral testimony,

affidavit or verified pleading, that he or she has not sufficient means to subsist during the prosecution or defense of the suit and to defray the necessary expenses thereof.

N.C.G.S. 50-16.8 governs the procedure whereby a dependent spouse may apply to the court for alimony pendente lite. N.C.G.S. 50-16.8(e), the statutory provision at issue here, provides with respect to notice to the supporting spouse upon application for alimony pendente lite:

> "(e) No order for alimony pendente lite shall be made unless the supporting spouse shall have had five days' notice thereof, but if the supporting spouse shall have abandoned the dependent spouse and left the State, or shall be in parts unknown, or is about to remove or dispose of his or her property for the purpose of defeating the claim of the dependent spouse, no notice is necessay."

The district court employed this provision to justify the total lack of prior notice to appellant of the pending



motion for alimony pendente lite and the ex parte hearing held thereon. (A p 40) Accordingly, appellant was directed to pay into the court for appellee's benefit $100.00 per week until further order of the court (A p 43), without having ever been notified of the hearing nor given an opportunity to defend. Insofar as N.C.G.S. 50-16.8(e) permits a court to order alimony pendente lite against a supporting spouse without first giving that spouse reasonable advance notice and an opportunity to be heard, appellant maintains that the statute is unconstitutional as working a deprivation of property interests without due process of law.

A. <u>The Statutory Direction Dispensing With Notice Deprives the Supporting Spouse of a Meaningful Opportunity to be Heard</u>.

For well over a century it has been a fundamental truth in our law that "[p]arties whose rights are to be affected are entitled

to be heard; and in order that they may enjoy that right they must first be notified." Baldwin vs. Hale, 68 U.S. (1 Wall.) 223, 233 (1864). See Grannis vs. Ordean, 234 U.S. 385, 394 (1914). The action of state courts in imposing penalties or depriving parties of their substantive rights without providing adequate notice and an opportunity to defend is a denial of due process. Shelley vs. Kraemer, 334 U.S. 1 (1948).

Though questions regarding due process of law frequently narrow to what process is due in particular circumstances, e.g., Morrissey vs. Brewer, 408 U.S. 471, 481 (1972), there can be no question that the most rudimentary guarantees of due process require some form of notice and an opportunity to be heard. Indeed, as this Court observed in Mullane vs. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950):



> "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." Id., at 313.

While it is abundantly clear that due process tolerates variances in the form of a hearing and the notice of hearing, "the Court has traditionally insisted that, whatever its form, opportunity for hearing must be provided before the deprivation at issue takes effect." Fuentes vs. Shevin, 407 U.S. 67, 82 (1972). See Wisconsin vs. Constantineau, 400 U.S. 433, 437 (1971).

These most basic of due process guarantees--notice and hearing--have been applied to a myriad of procedures, some of which are only quasi-judicial at best. E.g., Sniadach vs. Family Finance Corp.,

395 U.S. 337 (1969)(prejudgment garnishment of wages); Goldberg vs. Kelly, 397 U.S. 254 (1970)(termination of state welfare benefits); Wolff vs. McDonnell, 418 U.S. 539 (1974)(intra-prison disciplinary procedures); Bell vs. Burson, 402 U.S. 535 (1971)(suspension of an individual's driver's license); Armstrong vs. Manzo, 380 U.S. 545 (1965)(adoption proceedings); Stanley vs. Illinois, 405 U.S. 645 (1972) (proceedings to remove an unwed father's custody over children). These are but a few of the procedures to which prior notice and hearing have been deemed by the Court to be essential to fair adjudication. It makes obvious sense, in all but a few cases, to require that notice and hearing be "granted at a meaningful time and in a meaningful manner," Armstrong vs. Manzo, supra, at 552, and this means at a time when the deprivation can either be pre-



vented or justified by resort to objective criteria. See, L. Tribe, American Constitutional Law, §10-14, at 544(1978).

Certainly a supporting spouse has a cognizable interest in being notified of a motion for alimony pendente lite, as well as an interest in asserting his or her position in the matter. This is so for the simple reason that an order for alimony pendente lite affects a deprivation of a property interest encompassed within the protection of the Fourteenth Amendment. Aside from the fact that an order to pay alimony is a personal judgment, see Keezer, Marriage and Divorce, §592, at 658 (3rd ed., 1946), it also acts to deprive the supporting spouse of an interest in particular property, viz., the wages and other income the supporting spouse receives. Wages have been identified as a particular type of property requiring special due process protection.

Sniadach vs. Family Finance Corp., supra, at 340. See North Georgia Finishing, Inc. vs. Di-Chem, Inc., 419 U.S. 601, 611 n.2 (1975)(Powell, J., concurring). Deprivation of an interest in wages is a deprivation of an interest in a basic necessity of life and must be accompanied by the appropriate procedural safeguards. Cf., Goldberg vs. Kelly, supra, at 264.

An order of alimony, whether it has effect only during the course of litigation or is of a more permanent nature, is a taking, and a rather obvious one at that. "Where the taking of one's property is obvious, it takes no extended argument to conclude that absent notice and a prior hearing, [such a deprivation] violates the fundamental principles of due process." Sniadach, supra, at 342. The concern here should be not that an order of alimony has been entered, but that it was entered



without notice and opportunity for the appellant to be heard. None would claim that the Constitution denies the state the power to enforce the obligations owed by a supporting spouse to a dependent spouse. Yet that is not the question here. Rather the question is whether enforcing those obligations by judicial means, without prior notice and hearing, is constitutionally defensible. See Stanley vs. Illinois, supra, at 652. N.C.G.S. 50-16.8(e) ignores the injunction mandating notice and opportunity to be heard, with the inevitable result that a supporting spouse is deprived of a significant interest in livelihood without ever having been notified or heard on the matter.

Though it is true that a hearing--albeit ex parte--was held before the court ordered appellant to pay alimony pendente lite (A p 1 "Relevant Docket Entries"), the hearing was meaningless to appellant

because neither he nor his attorney had knowledge of the hearing and no effort whatsoever was made to inform them. A "hearing," in its constitutional and common meaning, necessarily presupposes the presence of all persons whose rights or duties are subject to adjudication, or at least a meaningful opportunity to be present. It takes no extended argument to recognize that notice has no significance in its own right; its significance lies in the fact that it informs parties of an upcoming hearing and enables them to marshal the facts and prepare a case for the hearing. See Memphis Light, Gas & Water Div. vs. Craft, 436 U.S. 1, 14 (1978). Therefore, providing a hearing without first notifying adverse parties transforms the hearing into an empty formality. The meaningful opportunity to be heard, a guarantee so often echoed by this Court, Grannis



vs. Ordean, supra, at 394, "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." Mullane vs. Central Hanover Bank & Trust Co., supra, at 314. See Armstrong vs. Manzo, supra, at 550.

The need for notice to appellant in the instant case existed notwithstanding the fact that he was the plaintiff in the underlying case for custody of the couple's child and notwithstanding the fact that the parties were involved in continuing litigation. First, alimony pendente lite is not granted automatically; it must be applied for, so the supporting spouse should not be charged with constructive knowledge that at some point he will have to pay alimony pendente lite. Second, since it is the dependent spouse who must initiate

the proceedings for alimony pendente lite, the proceedings are essentially ancillary to the underlying action, and with respect to those proceedings, it is the dependent spouse who fulfills the role of plaintiff. Therefore, the supporting spouse should be notified of the dependent spouse's actions. Third, applications for alimony pendente lite, as in this case, often are not made until some time after the underlying action is commenced. In this case it was approximately two months after the suit was commenced that appellee moved for alimony pendente lite. (A pp 3, 22, 35) It is not as if the motion was made immediately following commencement of the suit, when the supporting spouse could reasonably be expected to take independent notice of the motion. Nor did any of appellee's responsive pleadings convey any indication that she contemplated applying for alimony



pendente lite. (A pp 10-21) Thus there was no way that appellant could have learned of the motion for alimony pendente lite without being duly notified either by the appellee or by the court. But as the trial court concluded, N.C.G.S. 50-16.8(e) nevertheless permitted the appellee and the court to dispense with any notice whatsoever. (A p 39)

Having established then that appellant was entitled under due process to notice and opportunity to be heard, that it would be unreasonable to impose any type of constructive notice upon him, and that the statute denied him any notice whatsoever, it is clear that N.C.G.S. 50-16.8(e) is unconstitutional as a denial of due process of law unless a state interest of overriding significance can be shown to justify the failure to give notice. Appellant will next address that argument.

B. No Government or General Public Interests Justify Awarding Alimony Pendente Lite Without According to the Supporting Spouse Prior Notice and a Reasonable Opportunity to be Heard.

1. N.C.G.S. 50-16.8(e) does not promote any government interests to the point where prior notice and hearing may be dispensed with.

Undoubtedly there are "extraordinary situations" which justify postponing the opportunity to be heard until after the deprivation. Boddie vs. Connecticut, 401 U.S. 371, 379 (1971). This Court has endeavored to identify those situations where such procedures are justified:

> "First, in each case, the seizure has been directly necessary to secure an important or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force; the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance." Fuentes vs. Sheven, supra, at 92.



The Court has permitted summary seizures and deprivations to collect the internal revenue of the United States, Bob Jones University vs. Simon, 416 U.S. 725 (1974); Phillips vs. Commission, 283 U.S. 589 (1931), to meet the needs of a national war effort, Central Union Trust vs. Garvan, 254 U.S. 554 (1921), to seize articles used in crime, Calero-Toledo vs. Pearson Yacht Leasing Co., 416 U.S. 663 (1974), to protect the public from misbranded drugs, Ewing vs. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950), and contaminated food, North American Storage Co. vs. Chicago, 211 U.S. 306 (1909), and to protect public institutions from serious

disruption, Goss vs. Lopez, 419 U.S. 565 (1975).

Alimony pendente lite does not present an extraordinary situation justifying a total abdication from due process notice and hearing requirements. Ordering a supporting spouse to pay alimony pendente lite does not further government or public interests to the point where prior notice and hearing are no longer required. The dependent spouse's interest is purely private, having no direct relationship to governmental or public needs. It is certainly no more clothed in the general public interest than was the repossession of personal property to pay a private debt, which was held not to be a sufficient government or public interest in Fuentes vs. Shevin, supra, at 92-93.

Moreover, even though the statute dispenses with notice only in those situations where there is at least an ostensible need for prompt action, it cannot seriously be contended that dispensing with prior notice is necessary to avert the potential catastrophic consequences that were involved in cases like Ewing and North American Storage, where failure to take immediate action could have posed serious health hazards to the general public. See Fuentes, supra, at 93. Actually, the most serious consequence which would result from requiring prior notice before a court orders temporary alimony would be a few days' delay before the supporting spouse is ordered to pay alimony. That this consequence is not of sufficient moment to justify dispensing with notice can be readily seen by reference to the fact that in all cases but those enumerated, N.C.G.S. 50-16.8(e) requires five days' prior notice. Furthermore, an order of alimony will have no practical effect until the supporting spouse receives it,

and if he has had no prior notice, it could be a number of days before the supporting spouse learns of the order. In short, even though alimony pendente lite has been characterized as a matter of urgency by the North Carolina courts, e.g., Williams vs. Williams, 261 N.C. 48, 134 S.E.2d 227 (1964), the simple fact is that delay is built into the system. Therefore, the few days' delay that might result from giving prior notice even in those cases where prompt action might otherwise be deemed necessary simply does not pose such a serious consequence as would justify a failure to give prior notice. Such a consequence, when weighed against the deprivation visited upon the supporting spouse, simply does not measure up to the extraordinary situations which traditionally have justified postponement of notice and hearing.



2. By dispensing with prior notice, the State spites its own goals of fair and effective adjudication.

Both the state and the individual share a fundamental interest in avoiding arbitrary determination. Goldberg vs. Kelly, at 266. The touchstone of due process is the protection of the individual against arbitrary action of government, Dent vs. West Virginia, 129 U.S. 114 (1889), and the most effective protection against arbitrary determination which affect substantial rights is prior notice and an opportunity to be heard. As this Court observed in Fuentes, the purpose of prior notice and the right to be heard "is to protect [the individual's] use and possession of property from arbitrary encroachment--to minimize substantively unfair or mistaken deprivations of property." Id., at 81.

Thus arises the major objection to ex parte proceedings to determine personal obligations and rights in property. While ex parte proceedings seem to be rife in domestic relations cases, their desirability is questionable where alimony is concerned. In cases where this Court has upheld the validity of ex parte orders of divorce for purposes of full faith and credit, it has refused to do so where ex parte orders of alimony were entered without the adverse party having been properly notified or appearing voluntarily. E.g., Estin vs. Estin, 334 U.S. 541 (1948). See also, May vs. Anderson, 345 U.S. 528 (1953). While appellant does not contend that the trial court was without jurisdiction over him, it is plain that any order of the court which adjudicates personal obligations should be made only where all interested parties have been given a reasonable



opportunity to protect their interests. Mullane vs. Central Hanover Bank & Trust Co., supra, at 314.

It is instructive to note that while virtually every state provides for alimony pendente lite by statute, only North Carolina specifically dispenses with prior notice without providing some specific opportunity for hearing. A numer of states[1] have adopted or patterned their own statutes after §304 of the Uniform Marriage and Divorce Act (Brief App.A,p 1a), which permits temporary orders without prior notice only upon a showing of irreparable injury, similar to the showing required to secure a temporary restraining order. §304 (b), (c) of the Uniform Mar-

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[1] E.g., C.R.S. §14-10-108 (Colorado); D.C.A. §1509(b) (Delaware); I.A.S. §501(6) (Illinois); Mont. Code §40-4-106 (Montana); N.R.S. §42-357 (Nebraska); R.C.U. §26.09.060 (Washington)

riage and Divorce Act. In addition, the Act provides methods whereby such orders may be dissolved §304 (d), (f)(2). Other states require prior notice and hearing in all cases of temporary alimony,[2] and still others require that if no prior notice and hearing is given, a hearing must be provided promptly after the order is entered to determine its accuracy.[3] Finally, several state statutes are silent as to

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[2]E.g., G.C.A. §§30-202, 30-213 (Georgia); I.S.A. §31-1-11.5-7 (Indiana); I.C.A. §598.11 (Iowa); Mo. Ann. Stats. §452.315(1) (Missouri); N.R.S. §125.040 (Nevada); N.M. Stats. §22-7-6(a) (New Mexico); V.S.A. §675 (Vermont); W.V.C. §48-2-13 (West Virginia); W.S.A. §247.23 (Wisconsin). See BNA, Family Law Rpts., Reference File, §401 et. seq.

[3]E.g., R.S.A. §458:16 (New Hampshire); N.D.Code §14-05-23 (North Dakota); O.S.A. §1276 (Oklahoma). See BNA Family Law Rpts., Reference File §401 et. seq.



prior notice,[4] which may form a basis for assuming that applications for alimony pendente lite are to be served on opposing parties just as are other pleadings and motions. The short of it is that ex parte orders of alimony are not particularly desirable and should not be encouraged except in those rare situations were circumstances require them.

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[4]E.g., Ala. Code §30-2-50 (Alabama); Alaska Stats. §09.55.200 (Alaska); A.R.S. §25-315B (Arizona); G.S.A. §46-50 (Connecticut); D.C. Code §16-911 (District of Columbia); F.S.A. §61.071 (Florida); Idaho Code §32-704 (Idaho); K.S.A. §60-1607 (a)(3) (Kansas); K.R.S. §403.160 (Kentucky); R.S.A. §722 (Maine); Mass. Ann. Laws c. 208, §17 (Massachusetts); M.S.A. §552.13 (Michigan); M.S.A. §578.14 (Minnesota); N.J.S.A. §2A:34-23 (New Jersey); McKinney's Cons. Laws §236 (New York); O.R.S. §107.095 (Oregon); P.S.A. §46 (Pennsylvania); G.L. §15-5-19 (Rhode Island); S.C. Code §20-3-120 (South Carolina); S.D. Laws §25-4-38 (South Dakota); T.C.A. §36-820 (Tennessee); Utah Code §30-3-33 (Utah); Code of Va. §20-103 (Virginia); W.S.A. §20-2-111 (Wyoming); see BNA, Family Law Rpts., Reference File §401, et. seq.

Ex parte proceedings, of the type envisaged by N.C.G.S. 50-16.8(e), cannot be expected to promote fair determinations. "[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights . . . [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." Joint Anti-Fascist Refugee Committee vs. McGrath, 341 U.S. 123, 170-72 (1951) (Frankfurther, J., concurring) Ex parte proceedings to determine appropriate temporary support spite the goals of fair and accurate decision making. North Carolina courts have expressed the policy that alimony determinations, whether permanent or pendente lite, are to be based on the dependent spouse's needs and the supporting spouse's ability to pay. Brady vs. Brady, 273 N.C. 299, 160 S.E.2d 13 (1968). Indeed, N.C.



G.S. 50-16.5(a) requires that determination of alimony be made "having due regard to the estates, earnings, earning capacity, condition, accustomed standard of living of the parties, and other facts of the particular case." And North Carolina courts require the trial judge to follow the requirements of the statute in making alimony determinations. E.g., Beall vs. Beall, 290 N.C. 699, 228 S.E.2d 407 (1976).

Yet, despite these admonitions, the facts of this case demonstrate that such informed determinations often cannot be made in ex parte proceedings. The only information before the court when it ordered alimony pendente lite on March 1, 1978, was appellee's affidavit which accompanied the motion for alimony pendente lite (A pp 29-34) and the statements in appellee's answer and counterclaim (A pp 22-28). Such ex parte allegations

> "are hardly a substitute for a prior hearing, for they test no more than the strength of the applicant's own belief in his rights. Since his private gain is at stake, the danger is all too great that his confidence in his cause will be misplaced. Lawyers and judges are familiar with the phenomenon of a party mistakenly but firmly convinced that his view of the facts and law will prevail, and therefore quite willing to risk the costs of litigation." Fuentes, supra, at 83.

Nowhere in any of the documents filed with the trial court is there anything more than appellee's allegations of need, nor is there any indication of appellant's ability to pay $100.00 per week in temporary alimony. (A pp 40-41). In fact, it would appear that this figure was arrived at, not on the basis of evidence, but on the basis of the amount specifically requested by appellee. (A p 35) Providing appellant with a reasonable opportunity to appear at the hearing, either personally or



through counsel, would have enabled the trial court to make a more informed judgment.[5]

A final consideration is that notice and opportunity to be heard must be granted at a time when the deprivation can be prevented, or when it can be justified by objective criteria. Fuentes, supra, at 81; Armstrong vs. Manzo, supra, at 552. Alimony already paid or accrued, unlike personal property consisting of goods, compare Mitchell vs. W. T. Grant Co., 416 U. S. 600 (1974), is in most cases something that cannot be returned to the supporting spouse in the event it is later determined that the order was erroneous. Coupled

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[5] Of course if a supporting spouse is notified of the hearing and chooses not to respond, he cannot thereafter be heard to complain about the order, and the court would be justified in arriving at a figure based solely on the allegations of the dependent spouse. See Windsor vs. McVeigh, 93 U.S. 274,278(1876). But such is not the case here.

with the increasingly high risks that ex parte alimony proceedings will lead to determinations which are based on conjecture rather than fact, due process requires that notice and opportunity to be heard be provided after the order for alimony is entered. Moreover, even if we were to assume that erroneous alimony awards could be totally cured by modification (and appellant does not--see Point I(c), infra), this Court has not "embraced the general proposition that a wrong may be done if it can be undone." Stanley vs. Illinois, supra, at 647. And the rule is all the more clear when the wrong in all likelihood cannot be totally undone.[6]

---

[6]Cases such as Ingraham vs. Wright, 430 U.S. 651 (1977),are inopposite to the instant case because of the general irreversibility of alimony payments or accruals which have occurred pursuant to an erroneous order of alimony pendente lite. In Ingraham, the Court held that notice and hearing need not precede administration of



Thus the existence of important personal interests of the appellant in not being required to pay alimony, together with the risks of arbitrary determinations in ex parte proceedings, weigh heavily against the relatively minor inconvenience to the appellee that would result from requiring prior notice of a motion for alimony pendente lite even where the supporting spouse has allegedly abandoned the spouse and left the state.[7]

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corporal punishment in schools, reasoning that the risks of arbitrary punishment were minimal because of a traditionally low incidence of abuse, openness of schools and common law safeguards, Id., at 682. Such considerations do not apply to ex parte alimony orders which present much more significant dangers of error.

[7]Interestingly, the trial court in this case had no demonstrable basis for finding as a matter of fact that appellant had abandoned the appellee. Neither appellee's answer and counterclaim nor the affidavit attached to the motion for alimony pendente lite contained any allegations or supporting facts of abandonment. See Appendix pp 29-34, 37, 38.

Against the appellee's interest in receiving alimony pendente lite without delay must be balanced the appellant's interest in insuring that permanent deprivation of his property via alimony is not based on arbitrary considerations. The balance tips decidedly in favor of appellant, since he stands much more to lose from lack of notice than appellee stands to gain by conducting an ex parte hearing. Accordingly, N.C.G.S. 50-16.8(e) cannot be justified as necessary to promote interests which are more important than appellant's interests.

C. Ability to Modify or Vacate an Order of Alimony Pendente Lite Does Not Cure the Unconstitutionality of Failure to Give Prior Notice to the Supporting Spouse.

1. Modification proceedings would require appellant to assume burdens of proof that he would not have had to assume if he had been



notified of the hearing.

In Armstrong vs. Manzo, 380 U.S. 545 (1965), this Court invalidated as unconstitutional a Texas adoption proceeding because the natural father of the child was not given prior notice of the proceedings. The Court further held that a hearing subsequently granted to the natural father did not cure the constitutional defect since he was forced to assume burdens of proof which, had be been accorded notice in the first place, would have rested upon the parties seeking the adoption. Id., at 550-552. The Court stated:

> "Had the petitioner [the natural father] been given the timely notice the Constitution requires, the Manzos, as the moving parties, would have had the burden of proving their case as against whatever defenses the petitioner might have interposed. . . . Had neither side offered any evidence, those who initiated the adoption proceedings could not have prevailed.
>
> Instead, the petitioner was faced on his first appearance

in the courtroom with the task of overcoming an adverse decree entered by one judge, based upon a finding of non-support made by another judge. As the record shows, there was placed upon the petitioner the burden of affirmatively showing that he had contributed to the support of his daughter to the limit of his financial ability over the period involved. The burdens thus placed upon the petitioner were real, not purely theoretical. For 'it is plain that where the burden of proof lies may be decisive of the outcome.' Speiser vs. Randall, 357 U.S. 513, 525. Yet these burdens would not have been imposed upon him had he been given timely notice in accord with the Constitution." Id., at 551. (Citation omitted) (Emphasis Added)

Precisely the same situation exists in the instant case. The only means whereby appellant can challenge the order for alimony pendente lite, other than by direct appeal, is by a separate proceeding to modify or vacate the order pursuant to N.C.G.S. 50-16.9. Subsection (a) of that statute provides that the party moving



for modification must show changed circumstances as the basis for modification,[8] and North Carolina courts have consistently held that the burden of proving changed circumstances rests with the party seeking the modification. E.g., Robinson vs. Robinson, 10 N.C.App. 463, 179 S.E.2d 144 (1971).

But the burden in the initial proceeding to determine alimony pendente lite is on the dependent spouse to prove that he or she is entitled to alimony pendente lite. N.C.G.S. 50-16.3. Rickert vs. Rickert, 282 N.C. 373, 193 S.E.2d 79 (1972). Thus the failure to give notice to appellant prior to the initial hearing to deter-

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[8] N.C.G.S. 50-16.9(a) provides: "An order of a court of this State for alimony or alimony pendente lite whether contested or entered by consent, may be modified or vacated at any time, upon motion in the cause and a showing of change circumstances by either party or anyone interested."

mine alimony pendente lite placed the burden of proof on him to overcome the adverse decree, a burden which he would not have had to shoulder had he been given timely notice in the first place. Because the opportunity to be heard must be granted at a meaningful time and in a meaningful manner, there must be a mechanism whereby the decree can be set aside and the case considered anew. Only that would restore the appellant to the position he would have occupied had due process of law been accorded to him in the first place. Armstrong vs. Manzo, supra, at 552.

2. Modification proceedings cannot undo the harm caused by the initial deprivation without prior notice.

Aside from the shift in burdens of proof, modification proceedings do not present the type of "prompt post-deprivation



hearing" contemplated by the Court as required by due process when prior notice and hearing cannot be reasonably accorded to a litigant. See Mitchell vs. W. T. Grant Co., 416 U.S. 600 (1974). This is so because modification is not an automatic procedure for use by a spouse against whom an adverse decree has been entered.[9] Not only must the supporting spouse bear the burden of proving facts entitling him to a modification, but he must also bear the burden of initiating the proceedings to challenge the validity of the adverse

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[9] It is interesting to note that North Carolina requires ex parte orders restraining a parent from abusing his or her children or a spouse from abusing the other spouse to be followed by an automatic hearing within ten days. N.C.G.S. 50B-2(b). Certainly the requirement of a prompt hearing in such cases where actual physical harm to a spouse or children is threatened mandates the provision of similar safeguards where alimony is concerned.

decree. This added burden makes the initial deprivation without prior notice and opportunity to be heard even more onerous. Cf., North Georgia Finishing, Inc., vs. Di-Chem, Inc., 419 U.S. 601, 613 (1975) (Powell, J., concurring).

A further problem with modification as the sole remedy for ex parte orders of alimony is that it offers prospective relief only. Alimony which has already accrued or been paid to the dependent spouse is ordinarily not recoverable and is not considered in modifying or vacating the decree itself, so the supporting spouse is in the position of having suffered a deprivation without having an adequate remedy therefor. It would seem that even the most rudimentary procedural safeguards would require something more. In keeping with the admonition that a litigant must be offered a meaningful opportunity to effectively



counter erroneous or arbitrary judicial determinations which deprive him of property interests, Mullane, supra, at 314, and where for some reason prior notice and hearing are not practicable or justified, minimum due process standards require the use of a post-deprivation procedure that will afford a complete remedy to the party who has been wrongfully deprived of property interests. In cases such as the instant case, this means a hearing that is automatic, and that requires the dependent spouse to prove the allegations that formed the basis of the trial court's decree in the prior ex parte proceeding.

Modification proceedings under N.C. G.S. 50-16.9 do not provide the cure for the constitutional defects inherent in any procedure for alimony pendente lite wherein the supporting spouse is not notified nor given a meaningful opportunity to present

his case. Modification proceedings are not automatic, nor do they require the dependent spouse to prove entitlement. Since subsequent hearings are supposed to serve the same purposes of a hearing with respect to wrongful deprivations and are not mere formalities, due process can be served only when such hearings are conducted in the same manner and with the same purposes in mind as prior hearings.

II. N.C.G.S. 50-16.8(e), AS APPLIED TO A SUPPORTING SPOUSE WHO HAS COUNSEL OF RECORD AND WHOSE ADDRESS IS KNOWN TO THE COURT AND TO ADVERSE PARTIES, VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

In Boddie vs. Connecticut, 401 U.S. 371 (1971), the Court observed:

> "Our cases . . . establish that a statute or rule may be held unconstitutionally invalid as applied when it operates to deprive an individual of a protected



> right even though its general validity as a measure enacted in the legitimate exercise of state power is beyond question . . . [T]he right to a meaningful opportunity to be heard within the limits of practicality, must be protected against denial by particular laws that operate to jeopardize it for particular individuals." Id., at 379-380.

This rule has been applied frequently to cases involving reasonable notice. For example, in Mullane vs. Central Hanover Bank & Trust Co., supra, the Court held that a statutory provision for notice by publication, although sufficient as to beneficiaries of a trust whose interests or addresses were unknown, was not sufficient as a matter of due process for known beneficiaries. Id., at 318. And in Covey vs. Town of Somers, 351 U.S. 141 (1956), the Court held that notice by publication in a foreclosure action, even though sufficient to provide a normal person with an opportunity for hearing, was not sufficient

where the defendant was a known incompeten. Id., at 146. Therefore it is eminently clear that a notice procedure, though generally valid, may fail to satisfy due process when applied to a particular individual or to a particular fact situation.

So if it is found that N.C.G.S. 50-16.8(e) is generally valid notwithstanding the fact that it authorizes deprivations of property interests without prior notice and opportunity to be heard, the statute must still be held invalid as it applies to the appellant herein and to the facts of this case. The particular question presented here is whether N.C.G.S. 50-16.8(e), in dispensing with notice requirements, is constitutionally defensible when the appellant had local counsel of record and when appellant's specific location was known to the court and to all adverse parties.



As was demonstrated in Point I(B), supra, in insisting upon adherence to a statute which dispenses with notice even when the supporting spouse has counsel of record who could easily be notified of a hearing to determine alimony pendente lite, the State "spites its own articulated goods" in judicial efficiency and integrity. Cf., Stanley vs. Illinois, supra, at 652-653. In such cases a refusal to notify counsel of record promotes uninformed judgments without promoting any need for prompt action. Furthermore, as was demonstrated in the trial court, refusal to notify counsel of record encourages mistrust and animosity between the supporting spouse and his counsel because of the failure of the client to understand why his attorney was not at the hearing when the decree was entered. (A pp 44-45)

Moreover, the dependent spouse's

desire to secure alimony promptly is better served by requiring counsel of record to be notified of the hearing. An order to pay alimony is of no practical effect until it is served upon the supporting spouse, unless the dependent spouse initiates collection procedures enumerated in N.C.G.S. 50-16.7. Therefore the dependent spouse must wait until the supporting spouse receives the order. On the other hand, if the supporting spouse's counsel of record is notified prior to the hearing, the supporting spouse could be charged with the knowledge his attorney has of the matter and a long delay between order and receipt would thus be avoided. Thus there is absolutely no interest of the dependent spouse which is served by refusing to notify the supporting spouse's counsel of record.

The North Carolina Court of Appeals was of the opinion that if notice is not



required to be served on a party, neither need it be served on his counsel of record, citing N.C.G.S. 1A-1, Rule 5 (Brief App.B, p 5a). But that response does not address the argument presented here: that due process required that appellant be served with notice unless circumstances would make such service impossible or unduly impractical, in which case due process would require that his counsel of record be served with notice. In other words, the court is under a duty to fulfill due process requirements by taking the next best course of action where the most desirable course of action cannot be taken. The next best course of action that could have and should have been taken here was to notify appellant's counsel of record. The propriety of such an approach is in full accord with the mandates of Rule 5 of the North Carolina Rules of Civil Procedure. Indeed, Rule 5

(b) provides that a party be notified through counsel of record unless the court directs otherwise, so the fact that appellant may have been outside of North Carolina at the time the motion was made for alimony pendente lite is largely irrelevant to the question of whether his counsel of record should have been notified in accordance with due process requirements.

The record also clearly shows that the trial court was aware of appellant's location in Springfield, Virginia, having made a finding of fact to that effect, (A p 40), as was appellee, since she had on previous occasions served various pleadings and other documents on appellant at his Springfield address. (R pp 9-11) So there can be no question but that the court and the appellee knew appellant's address in Virginia. Notification to him,



by regular or certified mail, of the pending motion for alimony pendente lite would have presented appellee with no unreasonable burden, nor would it have presented any undue delay. Due process touches upon what is reasonable under the circumstances, Cafeteria & Restaurant Workers Union vs. McElroy, 367 U.S. 886, 895 (1961), and in this case notification by mail to the appellant would have been eminently reasonable.

Accordingly, N.C.G.S. 50-16.8(e), in its application to the appellant and to the facts of this case, presents two distinct constitutional infirmities. It does not provide for notice to counsel of record in those cases where notice to the supporting spouse would be impractical, and it does not provide for reasonable notice to the supporting spouse where notice would be practical, even where the supporting

spouse has allegedly abandoned the dependent spouse and left the state. Therefore, N.C.G.S. 50-16.8(e), as applied to deprive appellant of property interests without adequate notice and opportunity to be heard, violates the Due Process Clause of the Fourteenth Amendment.

## CONCLUSION

Based on the foregoing considerations, appellant respectfully requests that the judgment of the North Carolina Court of Appeals be reversed and the case be remanded with directions to vacate or dissolve the order for alimony pendente lite and attorney's fees entered on March 1, 1978.

Respectfully submitted,

John F. Morrow,
Attorney for appellant



## CERTIFICATE OF SERVICE

The undersigned attorney for appellant hereby certifies that he served required copies of the foregoing brief of appellant on attorney for appellee this the 25 day of February, 1980.

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APPENDIX A

Uniform Marriage and Divorce Act 201:0003

Section 304. [Temporary Order or Temporary Injunction.]

(a) In a proceeding for dissolution of marriage or for legal separation, or in a proceeding for disposition of property or for maintenance or support following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse, either party may move for temporary maintenance or temporary support of a child of the marriage entitled to support. The motion shall be accompanied by an affidavit setting forth the factual basis for the motion and the amounts requested.

(b) As a part of a motion for temporary maintenance or support or by independent motion accompanied by affidavit, either party may request the court to issue a temporary injunction for any of



the following relief:

(1) restraining any person from transferring, encumbering, concealing, or otherwise disposing of any property except in the usual course of business or for the necessities of life, and, if so restrained, requiring him to notify the moving party of any proposed extraordinary expenditures made after the order is issued;

(2) enjoining a party from molesting or disturbing the peace of the other party or of any child;

(3) excluding a party from the family home or from the home of the other party upon a showing that physical or emotional harm would otherwise result;

(4) enjoining a party from removing a child from the jurisdiction of the court; and

(5) providing other injunctive relief proper in the circumstances.

(c) The court may issue a temporary restraining order without requiring notice to the other party only if it finds on the basis of the moving affidavit or other evidence that irreparable injury will result to the moving party if no order is issued until the time for responding has elapsed.

(d) A response may be filed within [20] days after service of notice of motion or at the time specified in the temporary restraining order.

(e) On the basis of the showing made and in conformity with Sections 308 and 309, the court may issue a temporary injunction and an order for temporary maintenance or support in amounts and on terms just and proper in the circumstance.

(f) A temporary order or temporary injunction:

(1) does not prejudice the rights of the



parties or the child which are to be adjudicated at subsequent hearings in the proceeding;

(2) may be revoked or modified before final decree on a showing by affidavit of the facts necessary to revocation or modification of a final decree under Section 316; and

(3) terminates when the final decree is entered or when the petition for dissolution or legal separation is voluntarily dismissed.

GENERAL STATUTES OF NORTH CAROLINA §1A-1,
Rule 5

Rule 5. Service and filing of pleadings and other papers.

(a) Service -- when required. -- Every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment and similar paper shall be served upon each of the parties, but no service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.



(b) Service -- how made. -- A pleading setting forth a counterclaim or cross-claim shall be filed with the court and a copy thereof shall be served on the party against whom it is asserted or his attorney of record. With respect to all pleadings subsequent to the original complaint and other papers required or permitted to be served, service with due return may be made in the manner provided for service and return of process in Rule 4 and may be made upon either the party or, unless service upon the party himself is ordered by the court, upon his attorney of record. With respect to such other pleadings and papers, service upon the attorney or upon a party may also be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by filing it with the clerk of court. Delivery of a copy within this rule means handing it to the attorney or

to the party; or leaving it at the attorney's office with a partner or employee. Service by mail shall be complete upon deposit of the pleading or paper enclosed in a post-paid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.
(1971, c. 538; c. 1156, s. 2.5; 1975, c. 762, s. 1.)

FOR ARGUMENT



IN THE
# Supreme Court of the United States
OCTOBER TERM, 1979

No. 79-492

ROBERT MICHAEL FUNGAROLI,

*Appellant,*

v.

JUDITH DIANE FUNGAROLI,

*Appellee.*

ON APPEAL FROM THE COURT OF APPEALS OF
NORTH CAROLINA

## BRIEF OF APPELLEE

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

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**No. 79-492**

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ROBERT MICHAEL FUNGAROLI,

*Appellant,*

v.

JUDITH DIANE FUNGAROLI,

*Appellee.*

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ON APPEAL FROM THE COURT OF APPEALS OF
NORTH CAROLINA

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## BRIEF OF APPELLEE

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## STATEMENT OF THE CASE

This is a civil action wherein the plaintiff [husband-father] filed a custody suit in the District Court of Forsyth County on December 21, 1977. (A p. 3). On the same day an *ex-parte* temporary custody order was signed by The Honorable Gary B. Tash awarding temporary custody to plaintiff. (A p. 8). On February 17, 1978, the defendant [wife-mother] served upon plaintiff an answer and counter-claim (A p. 22) seeking, *inter alia*, custody of the minor

child, temporary alimony, and permanent alimony.[1]

On February 18, 1978, The Honorable Gary B. Tash entered an *ex-parte* order allowing the defendant specific visitation privileges with her child on Sunday, February 19 and Wednesday, February 22 and for "a like period of time on each and every Sunday and Wednesday thereafter until further order of this Court". (A p. 13). Following the plaintiff's failure to comply with the Court's order on February 19 and February 22, respectively, the defendant did, on the 24th day of February, 1978, move the court for an order requiring plaintiff to appear and show cause why he should not be held in contempt of court for willfully failing and refusing to obey the court's order of February 18. The motion further requested the court to enter an order requiring the plaintiff to produce the minor child at the show cause hearing and to enter a preliminary injunction requiring the plaintiff "not to remove said child from Forsyth County without the permission of the court". Copies of the motion and the accompanying affidavit of the defendant (A p. 14–15) were served upon both the plaintiff and his then attorney of record. The defendant's motion was made on the same day that she received by certified mail a summons and petition from the Juvenile and Domestic Relations Court of Fairfax County, Virginia notifying her that her husband had, on the 21st day of February, 1978, filed a second action for custody of the parties' minor child. (A p. 15–19).

As a result of defendant's motion, the court did, on February 24, 1978, enter an order requiring the plaintiff to

[1]As will be noted on the original of the answer and counterclaim, the pleading was first filed on February 17, 1978. For reasons unknown to counsel, that date was subsequently "x'd" out and the pleading was restamped February 28, 1978.



appear on the 6th day of March, 1978, and show cause why he should not be held in contempt of court for violation of the order previously entered on February 18 regarding visitation. The order (A p. 20–21) further required the plaintiff to bring with him to the hearing the minor child. As was the case with the defendant's Motion to Show Cause, the court's order of February 24th was served upon the plaintiff at his new address in Springfield, Virginia, as well as upon his attorney of record in the North Carolina proceeding. When the plaintiff failed to appear before the Court on March 6, 1978 (A p. 46) the court went on to find as a fact that "at no time subsequent to February 18, 1978, had the plaintiff complied in any respects with the order of this court of the same date", and that "the plaintiff has fled to the State of Virginia for the sole purpose of obstructing the Order of this court dated February 18, 1978". (A p. 47). The court then proceeded to adjudge the plaintiff in contempt of court, but provided that the plaintiff could "purge himself of both civil and criminal contempt by personally appearing before the Court on or before March 20, 1978". (A p. 48). The plaintiff did not so appear.

Prior to the March 6 hearing, *viz.*, March 1, 1978, the defendant, through counsel, filed a motion for alimony *pendente lite.* (A p. 35). The motion was accompanied by an affidavit from the defendant (A p. 37), as well as copies of the verified pleadings filed by the plaintiff in the Domestic Relations Court of Virginia (A p. 15–19) indicating that plaintiff had now taken up permanent residence in Springfield, Virginia. Because of the plaintiff's prior refusals to obey court orders requiring him to appear, and because counsel for defendant was informed by plaintiff's North Carolina business partner that plaintiff was contemplating a transfer of all his North Carolina business

interests for the purpose of avoiding and obstructing any alimony order which might be forthcoming,[2] counsel for defendant chose to avail himself of the provisions of N.C.G.S. §50-16.8(e) which provides that no notice need be given to a supporting spouse who has fled the state and abondoned the dependant spouse. Upon the court's finding that "the plaintiff, Robert Michael Fungaroli, has left the State of North Carolina and is living presently in Springfield, Virginia", and that the plaintiff had: abandoned the defendant, maliciously turned her out of doors; rendered such indignities to the person of the defendant as to render her condition intolerable and her life burdensome; and, had willfully failed to provide the defendant with the necessary subsistence according to his means and condition,[3] the court entered an order requiring plaintiff to pay the defendant temporary alimony in the amount of $100.00 per week. Thereafter, on August 8, 1978, the court entered an order awarding custody of the minor child to the defendant wife.

From the orders of March 1 and August 8, plaintiff appealed to the North Carolina Court of Appeals. On March 20, 1979 that Court affirmed the decision of the trial court granting temporary alimony. 40 N.C. App. 397, 252 S.E.2d 397. On October 2, 1979 the Court of Appeals in an unpublished opinion (Brief App. A) affirmed the trial

[2]Indeed, plaintiff subsequently transferred his entire North Carolina assets to a corporation run by his father, a resident of Virginia. As a result thereof, defendant now has pending in the Superior Court of Forsyth County an action to set aside the alleged fraudulent conveyance. *Fungaroli* v. *Fungaroli*, et al., File No. 79 CVS 3683.

[3]The defendant was involuntarily hospitalized from December 21, 1977 until February 15, 1978, pursuant to a petition taken out by the plaintiff.



court's award of custody to defendant. The plaintiff has yet to comply with either of these decisions, despite the North Carolina Supreme Court's decision to deny review in each.[4]

## ARGUMENT

### I.

### THIS COURT SHOULD REFUSE TO EXERCISE JURISDICTION HEREIN—PURSUANT TO 28 U.S.C.A. §§1257(2), 1257(3)—INASMUCH AS THE CONSTITUTIONALITY OF N.C.G.S. §50-16.8(e) HAS NOT BEEN PROPERLY PRESENTED TO THE APPELLATE COURTS OF NORTH CAROLINA AND HAS NOT BEEN PASSED UPON BY THEM.

Appellant contends that "[t]his action is an appeal from *a holding* by the North Carolina Court of Appeals and the North Carolina Supreme Court *that a statute is constitutional* under the Constitution of the United States of America". (Brief of Appellant, p. 1) (emphasis supplied). At the outset it will be easily noted that neither the decision of the North Carolina Court of Appeals (Jurisdictional

[4]Indeed, on January 21, 1980, the Assistant District Attorney for Forsyth County sought and obtained true bills of indictment against plaintiff, his mother and father, charging each with "Transporting Child Outside the State With Intent to Violate Custody Order". (Brief App. B, pp. 1b, 2b, 3b). The indictments have yet to be served on appellant inasmuch as his present whereabouts is unknown. Furthermore, as of March 13, 1980, the arrearage under the temporary alimony order totalled $10,600.00.

Statement, App. A, p. 5a) nor the Judgment of the North Carolina Supreme Court dismissing the appeal to that court (*id.* at 8a) rules in any way upon the constitutionality of §50-16.8(e). The decision of the North Carolina Court of Appeals makes no reference whatsoever to the "constitutionality" of anything; indeed, the opinion is bereft of the word itself. In *Street v. New York*, 394 U.S. 576, 581-582 (1969), this Court stated that

> [i]n order to vindicate our jurisdiction to deal with this particular issue [constitutionality of the "words" portion of former §1425, subd. 16, par. d, of the New York Penal Law], we must first inquire whether the question was presented to the New York Courts in such a manner that it was necessarily decided by the New York Court of Appeals when it affirmed appellant's conviction. If the question was not so presented, then we have no power to consider it [under 28 U.S.C. §§1257(2), 1257(3)]. *Moreover, this Court has stated that when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.* [Citations omitted]. (Emphasis added).

*And see, Bailey v. Anderson*, 326 U.S. 203, 206-207 (1945); *Chicago, I.&L.R. Co. v. McGuire*, 196 U.S. 128, 131-133, 413 (1905); *Wilson v. Cook*, 327 U.S. 474, 480-482 (1946) ("We can consider only the federal questions passed upon the State Supreme Court").

In the case at bar, proper inquiry into whether appellant presented the constitutionality of N.C.G.S. §50-16.8(e) in such a manner that it was necessarily decided by the North Carolina Supreme Court when it dismissed appellant's appeal "for lack of [a] substantial constitutional question"



compels a negative response for several reasons. First, appellant did not raise the constitutional issue at the trial level. Although he had been given no notice of the temporary alimony hearing and was therefore not present to raise the issue of lack of notice, appellant should have—upon receipt of the alimony order—raised the constitutionality of the statute by way of a motion for relief, pursuant to the provisions of Rule 60(b)(6), North Carolina Rules of Civil Procedure.[5]

Second, appellant failed to raise the constitutionality of the statute at the time he grouped his exceptions and assignments of error to the North Carolina Court of Appeals.[6] The only assignment of error to the Court of

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[5]"On motion and upon such terms as are just, the court may relieve a party of his legal representative from a final judgment, order or proceeding for the following reasons:

* * * * * *

(6) any other reason justifying relief from the operation of the judgment."

[6]Rule 10(a), North Carolina Rules of Appellant Procedure, provides as follows:

> (a) Functioning in Limiting Scope of Review. Except as otherwise provided in this Rule 10, the scope of review on appeal is confined to a consideration of those exceptions set out and made the basis of assignments of error in the record on appeal in accordance with this Rule 10. No exception not so set out may be made the basis of an assignment of error, and no exception so set out which is not made the basis of an assignment of error may be considered on appeal. Provided, that upon any appeal duly taken from a final judgment any party to the appeal may present for review, by properly raising them in his brief, the questions whether the judgment is supported by the verdict or by the findings of fact and conclusions of law, whether the court had jurisdiction of the subject matter, and whether a criminal charge is sufficient in law, notwithstanding the absence of exceptions or assignments of error in the record on appeal.

Appeals which is even tangentially related to the issue presented to this Court provides:

> I. The trial court committed prejudicial error in conducting a hearing upon the defendant's motion for temporary alimony in that the answer and counterclaim was never properly served upon the plaintiff and in that the plaintiff was not given notice of the hearing.
>
> EXCEPTION NO. 1 (R. p. 21)

(Record on Appeal, p. 29).

Third, appellant did not raise the constitutionality of §50-16.8(e) in his brief to the Court of Appeals. The issue presented to that Court for review was:

> Did the court err in conducting an alimony pendente lite hearing as the plaintiff appellant did not have notice of said hearing.

(Plaintiff Appellant's Brief to the North Carolina Court of Appeals, p. 1). Appellant's three page discussion of this issue did little more than quote the well known language from *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), as well as Strong's, 3 N.C. INDEX 3rd. *Cf., Charleston Federal S.& L. Ass'n. v. Alderson*, 324 U.S. 182, 185 (1945): "It is essential to our jurisdiction on appeal . . . that there be an *explicit and timely insistence in the state courts that a state statute, as applied, is repugnant to the federal constitution* . . ." (Emphasis added).

Fourth, appellant's direct appeal to the North Carolina Supreme Court made no mention whatsoever regarding the constitutionality *vel non* of N.C.G.S. §50-16.8(e). *A fortiori*, appellant has raised that issue for the first time in this Court. (Brief of Appellant, p. 13). *Cf., VanHuffel v. Harkelrode*, 284 U.S. 225 (1931). In *VanHuffel*, petitioner contended that the order of the Bankruptcy Court authorizing a sale free from incumbrances was void as against the state for lack of notice and opportunity to be heard. Mr. Justice Brandeis, writing for a unanimous court, discharged the writ of certiorari after holding that



> [w]e have no occasion to pursue the argument. So far as appears, neither of these objections was made by the treasurer below, nor were they discussed by any of the state courts. They cannot, therefore, be urged here.

*Id.* at 229. *And see, Wilson v. Cook, supra; Street v. New York, supra; Walters v. City of St. Louis Mo.*, 347 U.S. 231, 233 (1954); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-435 (1940); *Slagle v. State of Ohio*, 366 U.S. 259, 264 (1961); *Musser v. State of Utah*, 333 U.S. 95, 98 (1948); *State Farm Mut. Automobile Ins. Co. v. Duel*, 324 U.S. 154, 160 (1945); *Charleston Federal S.&L. Ass'n. v. Alderson, supra; Raley v. State of Ohio*, 360 U.S. 423, 434-435 (1959).

In short, this Court has shown no hesitancy to refuse to decide a cause which was neither presented to, nor ruled upon, by the highest state appellate court. Because the appellant herein has not—indeed cannot—meet his affirmative obligation under *Street v. New York, supra*, appellee respectfully contends that this Court should dismiss this appeal.

## II.

## N.C.G.S. §50-16.8 MEETS THE DUE PROCESS REQUIREMENTS OF THE FOURTEENTH AMENDMENT, BOTH ON ITS FACE, AND AS APPLIED.

In order for this Court to properly analyze the issue presented by appellant, appellee respectfully suggests dual lines of inquiry which often overlap, but which ultimately provide the necessary resolution of the controversy. First, a general inquiry into the particular circumstances of this case, including the nature of the private and governmental interests affected. Second, a detailed inquiry into whether N.C.G.S. §50-16.8(e) meets the applicable due process standards enunciated by this Court when viewed in the light of the particular circumstances of the instant case, including the private and governmental interests affected.

### A. The particular circumstances of the case, including the governmental and private interests affected—

Although "[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause", *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950), it is now settled law that: due process does not require a hearing "in every conceivable case of government impairment of private interest", *Cafeteria Workers v. McElroy*, 367 U.S. 886, 894 (1961), and see *Stanley v. Illinois*, 405 U.S. 645, 650 (1972); "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable



situation"; and that "consideration of *what procedures due process may require under any given set of circumstances* must begin with a determination of the *precise nature of the governmental function involved as well as of the private interest that has been affected* by governmental action". *Cafeteria & Restaurant Workers Union v. McElroy, supra,* at 895 (emphasis added). *And see Goldberg v. Kelly*, 397 U.S. 254, 263 (1970).

First then, the "given set of circumstances" in the instant case. Appellant filed his complaint on December 21, 1977, alleging that he was a citizen and resident of Forsyth County, North Carolina, and further alleging that because of his wife's mental illness, custody and control of the minor child born of the marriage should be awarded to him (A. p. 3). The Complaint and Summons were served on the wife the same day, immediately prior to commencement of other court proceedings held for the purpose of ruling on appellant's Petition to have his wife involuntarily committed to a mental hospital (A. p. 6). At the time of filing appellant also obtained an *ex-parte* order giving him temporary custody of the minor child (A. p. 8).

After having obtained an extension of time to answer or otherwise plead, the wife served upon appellant—on February 17, 1977—an answer and counterclaim. Based upon the allegations contained in the counterclaim the wife prayed, *inter alia*, for an award of temporary alimony (A. p. 27). Thus, despite appellant's declarations to the contrary,[7] appellant had notice of his wife's alimony claim

[7] "Nor did any of appellee's responsive pleadings convey any indication that she contemplated applying for alimony *pendente lite.*" (Brief of Appellant, pp. 24–25).

at least as early as February 19, 1978.[8] The situation is, therefore, quite unlike the situation with which petitioner was faced in *Armstrong v. Manzo*, 380 U.S. 545 (1965). There the natural mother and her new husband took all preliminary steps necessary for adoption, and ultimately secured a final decree of adoption of petitioner's daughter, all without the petitioner having "the slightest inkling of the pendency of these adoption proceedings". *Id.* at 548. *See also, Fuentes v. Shevin*, 407, U.S. 67, 75 (1972) ("Thus, at the same moment that the defendant receives the Complaint seeking possession of the property through court action, the property is seized from him."); *North Georgia Finishing v. Di-Chem*, 419 U.S. 601, 604 (1975) ("Simultaneous with the filing of the Complaint and *prior to its service on petitioner*", the Clerk of Court "forthwith issued summons of garnishment to the bank") (emphasis added).

On February 18, 1978 appellant was served with an order (A. p. 12) requiring him to allow his wife to have visitation with the minor child on Sunday, February 19, and Wednesday, February 22, and "on each and every Sunday and Wednesday thereafter . . .". At none of the appointed times did appellant appear with the child. Thereafter, Mrs. Fungaroli was served with a summons and verified petition signed by appellant seeking custody of the minor child in

[8]After obtaining an extension of time to reply, appellant's reply to the counterclaim was served on March 15, 1978. Furthermore, the trial court found as a fact that the appellant "left the State of North Carolina, and carried with him the minor child . . . after he field the instant action, *and after the defendant had answered and counterclaimed for alimony, alimony pendente lite*, and custody . . . and after this court had entered an Order herein . . . requiring the plaintiff to allow the defendant to visit with her minor child . . ." (A. p. 40).



the Juvenile and Domestic Relations Court of the City/County of Fairfax, Virginia. The verified petition, which was dated February 21, 1978 (A. p. 19) alleged that the appellant and child both resided at 7225 Braddock Road, Springfield, Virginia (A. p. 17).[9]

Thus, at the time the March 1 motion for temporary alimony was made by counsel for appellee, counsel—and the court—were faced with the following set of "circumstances": appellant had, by his own sworn petition, left the State of North Carolina, taking the minor child with him, and leaving no support for his wife who had just been released from the hospital (A. pp. 40–41), and who had monthly living expenses of approximately $731.00 (A. p. 34). Finally, and most importantly, counsel for appellee was advised by appellant's North Carolina business partner that appellant was contemplating the transfer of all his North Carolina assets to his father, a Virginia resident, for the sole purpose of thwarting any alimony order which might be forthcoming.[10] For all these reasons, especially the last, no notice was given appellant of appellee's motion for temporary alimony. *See*, N.C.G.S. §50-16.8(e). *Cf.*,

[9]Appellant thereafter filed yet another action in Virginia seeking annulment of the marriage. Although the wife was unable to attend the hearing therein because of her medical condition, the trial court nevertheless granted the annulment. On appeal the Virginia Supreme Court affirmed. Relying on the Virginia affirmance, appellant has moved for summary judgment on the issue of temporary and permanent alimony in the North Carolina trial court. Arguments on the motion are now scheduled for the week of March 25, 1980.

[10]Appellee subsequently sued appellant to set aside the fraudulent conveyance. Appellee took the deposition of the partner. He testified, in substance, that appellant had indeed transferred his partnership interest to his father in explicit derrogation of the terms of the partnership agreement.

*Mitchell v. W. T. Grant*, 416, U.S. 600, 609 (1974):

> An important factor in this connection is that . . . the seller's vendor's lien expires if the buyer transfers possession. It follows that if the vendor is to retain his lien . . . it is imperative when default occurs that the property be sequestered in order to foreclose the possibility that the buyer will sell or otherwise convey the property to third parties against whom the vendor's lien will not survive. *The danger of destruction or alienation cannot be guarded against if notice and a hearing before seizure are supplied. The notice itself may furnish a warning to the debtor acting in bad faith.*

(Emphasis added). And *compare* N.C.G.S. § §50-16.8(e); 50-16.7(e) ("the remedies of attachment and garnishment . . . shall be available in actions for alimony or alimony pendente lite as in other cases, *and for such purposes the dependent spouse shall be deemed a creditor of the supporting spouse*") (emphasis added); 50-16.7(h) ("*a dependent spouse* for whose benefit an order for the payment of . . . alimony pendente lite has been entered *shall be a creditor* within the meaning of Article 3 of Chapter 30 of the General Statutes relating to fraudulent conveyances") (emphasis supplied), *with Sniadach v. Family Finance Corp.*, 395 U.S. 337, 339 (1969):

> [I]n the present case *no situation requiring special protection to a state or creditor interest* is presented by the facts; *nor is the Wisconsin statute narrowly drawn to meet any such unusual condition. Petitioner was a resident of this Wisconsin community* and in personam jurisdiction was readily obtainable. (Emphasis added).

The respective interests of the parties and the state were thus known to the trial judge at the time that he, in his



discretion,[11] concluded that notice was unnecesary. On the one hand both the state and the appellee had a legitimate interest in assuring that any alimony which might be ordered would be paid, that appellant not be allowed to defeat such a right through the mechanism of a fraudulent conveyance, and that appellee not therefore be forced onto the state's welfare rolls in order to live. On the other hand, appellant argues nothing more than that his "rights" were violated when he was given no notice of the hearing itself.[12] He does not—indeed cannot—now claim that he had: not left the state; not abandoned his wife; and not transferred his North Carolina assets beyond the reach of the North Carolina courts. Nor does he now claim that his income—prior to the transfer of his assets—was insufficient to pay the alimony ordered. In short, appellant makes no showing of how his "rights" would have been protected had he been given prior notice and an opportunity to be heard. And since he has made no payments to date under the order,[13] he has not, as a practical matter, been "deprived" of anything.

### B. N.C.G.S. §50-16.8(e) meets the due process standards previously enunciated by this Court—

Having thus reviewed the "given set of circumstances" and the "nature of the government function involved as well

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[11]Appellee does not read the "no notice" provision of §50-16.8(e) to be mandatory upon the trial judge.

[12]As discussed *supra*, appellant did have notice of his wife's claim for temporary and permanent alimony.

[13]Under North Carolina law an appeal does not authorize violation of such an order. *Upton v. Upton*, 14 N.C. App. 107, 187 S.E.2d 387 (1972).

as of the private interest that has been affected by governmental action", *Cafeteria Workers v. McElroy, supra* at 895, there remains for the Court's consideration only the question of whether, given the circumstances heretofore canvassed, N.C.G.S. §50-16.8(e) meets at least minimal due process standards heretofore outlined by the Court.

First, it will be noted that a recurrent strain running through most of the cases in which this court has required notice and hearing prior to seizure has been the fact that "bare assertion [or conclusiory allegations] of the party" seeking relief has been sufficient in and of itself for the clerk to grant the relief sought. *E.g., Fuentes v. Shevin*, 407 U.S. 67, 73-75 (1972); *North Georgia Finishing v. Di-Chem*, 419 U.S. 601, 607 (1975); *Armstrong v. Manzo*, 380 U.S. 545, 547 (1965); *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 338 (1969) (garnishment summons issued "at the request of the creditor's lawyer").

The North Carolina statute followed in this case mandates a considerably different procedure. N.C.G.S. §50-16.8(e) permits the trial judge—as opposed to a court functionary—to dispense with notice only where there is a finding that "the supporting spouse shall have abandoned[14] the dependent spouse and left the State, or shall be in parts unknown, or is about to remove or dispose of his or her property for the purpose of defeating the claim of the dependent spouse". *Cf., Mitchell v. W. T. Grant Co.,*

[14]Pursuant to the provisions of N.C.G.S. §50-16.2(4), one spouse abandons the other where he or she brings their cohabitation to an end without justification, without the consent of the other spouse and without any intent of renewing it. *Panhorst v. Panhorst*, 277 N.C. 664, 178 S.E.2d 387 (1971); *Bowen v. Bowen*, 19 N.C. App. 719, 200 S.E.2d (1973).



*supra*, 416 U.S. at 616-617. *See also, Sniadach v. Family Finance Corp., supra*, 395 U.S. at 339 ("[n]o situation requiring *special protection to a state or creditor interest* is presented by the facts; nor is the Wisconsin statute *narrowly drawn* to meet any such unusual condition") (emphasis added). Moreover, in the instant case the appellant himself, by filing his new custody action in Virginia, provided the North Carolina trial judge with the "documentary proof", *Mitchell* at 617-618, necessary for a determination that he had fled the jurisdiction of the North Carolina courts some four days after he had been served with his wife's claim for temporary and permanent alimony. True that there was not, *at the time*, any *documentary* proof of an impending fraudulent conveyance; the ends of justice and protection of legitimate creditor interests would be poorly served, however, if the court were forced to wait until the debtor had actually conveyed the property and fled the state, thereby placing both himself and his property beyond the court's reach. To reiterate, "[t]he notice itself may furnish a warning to the debtor acting in bad faith". *Id.* at 609. Moreover, in *Mitchell*, this Court was concerned not only with the question of "whether the buyer, with possession and power over the property, will destroy or make away with the goods". but also the fact that "the buyer in possession of consumer goods will undeniably put the property to it's intended use, and the resale value . . . will steadily decline as it is used over a period of time". *Id.* at 608. The interests of the creditor-wife in the instant case are more compelling: transfer of her husbands assets would defeat the very purpose of temporary alimony, *i.e.*, provide her with the means to subsist during the pendency of the lawsuit. N.C.G.S. §50-16.3(2). Stated otherwise, notice to the supporting spouse, under circumstances such as exist in

this case, "may drive a [dependent spouse] to the wall". *Sniadach v. Family Finance Corp., supra*, 395 U.S. at 341-342.

Second, and perhaps more importantly, the "usual rule" on the prior notice and hearing cases has been that

> [w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate. Phillips v. Commissioner, 283 U.S. 589, 596-597, 75 L.Ed. 1289, 51 S.Ct. 608 (1931). See also, Scottish Union v. National Ins. Co. v. Bowland, 196 U.S. 611, 632, 49 L.Ed. 619, 25 S.Ct. 345 (1905); Springer v. United States, 102 U.S. 586, 593-594, 26 L.Ed. 253 (1881).

*Mitchell v. W. T. Grant Co., supra*, at 611-612. *And see Ewing v. Mytinger & Casselberry*, 339 U.S. 594 (1950).

Prior to 1961, "judicial enquiry" on an application by the wife for temporary[15] alimony was limited to the question of whether "the wife is without sufficient means to cope with her husband in presenting their case before the court". *Oliver v. Oliver*, 219 N.C. 299, 13 S.E.2d 549, 555 (1941); *Brannon v. Brannon*, 247 N.C. 77, 100 S.E.2d 209, 211 (1957). This limitation followed from the wife's "common law *right* . . . without statutory aid", *Medlin v. Medlin*, 175 N.C. 529, 95 S.E. 857, 858 (1918) (emphasis added), to have the husband "furnish the necessary funds to enable her to so defend the action as to bring about a fair investigation of the charges and a just determination of the issues". *Holloway v. Holloway*, 213 N.C. 662, 200 S.E. 436, 437 (1939). And the wife "will not be deprived of the

[15]N.C.G.S. §50-16.3(6) provides that alimony pendente lite "shall be limited to the pendency of the suit in which the application is made".



support due her from her husband until a jury has determined the issue adversely to her in a trial in which she has had a fair opportunity, and reasonable means with which, to defend herself". *Id. And see generally, Note, Domestic Relations—Basis of the Award of Alimony Pendente Lite in North Carolina*, 39 N.C.L. Rev. 189 (1961).

Thus, under North Carolina common law,[16] as well the present statutory procedure, ultimate judicial determination of liability is "postponed" until trial on the merits, and temporary alimony is for the sole purpose of allowing the dependent spouse to maintain herself pending final determination of the issues. *Gardner v. Gardner*, 40 N.C. App. 334, 252 S.E.2d 867 (1979).

In the instant action appellant himself thwarted the "ultimate judicial determination of liability". *Mitchell v. W. T. Grant, supra*. Not only did he, for all practical purposes, abandon the North Carolina action he had himself instituted, making no request or attempt to place the action on the "ready" trial calendar, *see* North Carolina Rules of Practice for Superior and District Courts, Rule 2 (d), (e); he also asked for—and obtained—a continuance on each of those occasions when appellee attempted to bring the matter to trial. It is thus the wife's contention that her husband—who has contributed nothing to her support since December of 1977—should not now be heard to complain that the "ultimate judicial determination of liability is [in]adequate". *Id.* at 611.

To summarize, when N.C.G.S. §50-16.8(e) is considered in light of the North Carolina alimony procedure

[16]As to the principle that subsequent legislation has not abrogated the common law, see *Medlin v. Medlin, supra.*

generally, it is clear that North Carolina has reached a constitutional accommodation of the respective interests of dependent and supporting spouses. The statute is narrowly drawn to protect a legitimate state and/or creditor interest; notice may be dispensed with only upon an adequate showing made to the trial judge, as opposed to a court functionary; and the supporting spouse may at any time bring the action on for a full hearing or trial at any time after the order is entered. In these circumstances appellant has not been deprived of due process.

## CONCLUSION

For the foregoing reasons appellee respectfully submits that this Court should dismiss this appeal inasmuch as it was neither raised nor decided in the courts below. Alternatively, appellee submits that this Court should hold N.C.G.S. §50-16.8(e) to be constitutional, both on its face, and as applied.

Respectfully submitted,

/s/ B. Ervin Brown, II
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## APPENDIX A

No. 7821DC1109
NORTH CAROLINA COURT OF APPEALS
Filed: 2 October 1979

ROBERT MICHAEL FUNGAROLI

v.

JUDITH DIANE FUNGAROLI

Forsyth County
No. 77CVD4340

Appeal by plaintiff from Freeman, Judge. Order entered 8 August 1978 in District Court, Forsyth County. Heard in the Court of Appeals 22 August 1979.

This is a civil action brought by plaintiff-father against defendant-mother to obtain custody of the minor child of the parties, Derek Cassidy Fungaroli, born 19 May 1977. Defendant filed answer resisting the complaint, alleging that she was a fit and proper person and plaintiff was not a fit and proper person to have custody of the child, and praying that custody be awarded to her. She also prayed for alimony without divorce and alimony *pendente lite.* After entry of varioius interlocutory orders not pertinent to the questions raised by the present appeal, [On a previous appeal this Court affirmed interlocutory orders awarding defendant alimony *pendente lite* and adjudging plaintiff in contempt for violating an order allowing defendant visitation privileges with the child. Fungaroli v. Fungaroli, 40 N.C. App. 397, 252 S.E.2d 849 (1979), *appeal dismissed*, 297 N.C. 452 (1979).] the matter was heard before District Judge William H. Freeman on the issue concerning custody of the child.

After hearing on the merits, Judge Freeman entered an order dated 1 June 1978, making findings of fact from which the court concluded that both plaintiff and defendant were fit and proper persons to have custody and visitation privileges with the child but that "it would be within the best interests of the welfare" of the child that his custody be placed with the plaintiff. Accordingly, the court awarded custody to the plaintiff and awarded defendant visitation rights on the first and third weekends of each month, for the entire month of July, and the week following Christmas of each year. There was no appeal from this order.

The matter giving rise to the present appeal was initiated on 31 July 1978, when the defendant filed a motion in the cause in which, among other matters, she alleged that plaintiff had given evidence during the prior hearings that he was residing in Springfield, Virginia, and caring for the child, but that plaintiff in fact had continued to live and work in Forsyth County. She also alleged:

> (9) That the defendant is informed, believes and therefore alleges that the plaintiff has not exercised the control and proper care for the needs of the minor child; that in truth and in fact, the minor child has been placed in the custody of the plaintiff's parents;
>
> (10) That the defendant is informed, believes and therefore alleges that for the Court to place the child in the custody of the grandparents would be in error since both the plaintiff and defendant were found to be fit and proper persons to have the care, custody and control of the said minor child.

Defendant moved that primary custody of the child be placed with her, "pending a hearing of this motion."

On 7 August 1978 District Judge Freeman conducted a hearing on defendant's motion. At this hearing both plaintiff



and defendant appeared and testified and presented other evidence. Following this hearing, the court entered an order dated 8 August 1978 in which the court found that there had been a material change in circumstances affecting the welfare of the child and ordered that custody be placed with the defendant-mother with the plaintiff-father being granted visitation rights. From this order plaintiff appeals.

John F. Morrow and N. Lawrence Hudspeth for plaintiff appellant.

Harold R. Wilson and John W. Sherrill for defendant appellee.

PARKER, Judge. Plaintiff assigns as error the trial court's ruling that the purpose of the 7 August 1978 hearing was to determine if there had been a substantial change in circumstances since the 1 June 1978 order sufficient to warrant a change in the award of custody. He contends that no notice was given by defendant's motion of any changed circumstances and that he was, therefore, without notice of the facts intended to be proved or of the relief sought. We find no error in the court's ruling.

"Changed circumstances do not have to be pled with specificity." *White v. White*, 296 N.C. 661, 670, 252 S.E.2d 698, 703 (1979); accord Elmore v. Elmore, 4 N.C. App. 192, 166 S.E.2d 506 (1969). In *White*, plaintiff sought an increase in support payments and alleged only that defendant's income had increased and that the monthly payments originally provided were "totally inadequate under the current circumstances." These allegations were held sufficient to withstand a motion to dismiss under Rule 12(b)(6). In the present case, while defendant's motion may not have been altogether artfully drawn, its allegations taken as a whole make it clear that defendant was contending that since the date of the earlier hearing plaintiff

had "not exercised the control and proper care for the needs of the minor child" because, contrary to his expressed intent as stated at the prior hearing, he had continued to live in Winston-Salem while the child remained with plaintiff's parents in Virginia. By these allegations plaintiff was given sufficient notice of the facts which defendant intended to prove. As for the relief sought, defendant's motion expressly requested that the court place primary custody of the child with her "pending a hearing" of her motion, and while the better practice would have been for her also to have prayed expressly for primary custody on a more permanent basis, there could have been no reasonable doubt that permanent custody was the actual relief which she was seeking. Plaintiff's first assignment of error is overruled.

Plaintiff assigns as error the trial court's admission of evidence concerning plaintiff's conduct prior to the order of 1 June 1978. In a hearing on modification of a custody order, the issue is whether there has been a substantial change in circumstances affecting the welfare of the child since the earlier order. "A decree of custody is entitled to such stability as would end the vicious litigation so often accompanying such contests, unless it be found that some change of circumstances has occurred affecting the welfare of the child so as to require modification of the order. To hold otherwise would invite constant litigation by a dissatisfied party so as to keep the involved child constantly torn between parents and in a resulting state of turmoil and insecurity." Shepherd v. Shepherd, 273 N.C. 71, 75, 159 S.E.2d 357, 361 (1968). In the present case, the trial judge permitted defendant's counsel to question plaintiff concerning his residence during the period prior to the order of 1 June 1978. However, the court stipulated that it would



consider the evidence for impeachment purposes only. A witness may be impeached by proof that he has made a statement at a former hearing that is inconsistent with his testimony at the present hearing or that his conduct was inconsistent with that earlier testimony. 1 Stansbury's N.C. Evidence (Brandis Rev.) §46. The issue of plaintiff's residence and his exercise of custody or control over the minor child after the date of the last custody order was directly before the court in the hearing on 7 August 1978, and the judge could properly consider evidence of his whereabouts prior to the previously entered custody order in determining his credibility as a witness.

In his Assignment of Error No. 6, plaintiff contends that defendant was improperly permitted to impeach her own witness, Jerry Casar. "[T]he rule that one may not impeach his own witness was modified in respect of civil cases by the adoption of G.S. §1A-1, Rule 43(b) of the North Carolina Rules of Civil Procedure." State v. Pope, 24 N.C. App. 644, 646, 211 S.E.2d 841, 842 (1975) aff'd, 287 N.C. 505, 215 S.E.2d 139 (1975). In pertinent part G.S. §1A-1, Rule 43(b) provides: "A party may interrogate an unwilling or hostile witness by leading questions and may contradict and impeach him in all respects as if he had been called by the adverse party." There can be no question but that Jerry Casar was an unwilling witness in this case. When questioned by defendant's counsel on direct examination, he admitted that he was unwilling to testify, stating: "I do not wish to become part of this ordeal, put it that way, I have a job, you know." In view of the witness's clearly expressed unwillingness to testify, defendant's counsel had the right under Rule 43(b) to ask him leading questions and to impeach him. This assignment of error, therefore, is overruled.

Plaintiff also contends that the court erred in admitting into evidence twenty-eight United Parcel Service Delivery records and in permitting the custodian of the records to testify concerning them when he had no personal knowledge of the facts shown by their contents. Before business records may be admitted into evidence, they must be authenticated by a witness who is familiar with them and the system under which they were made. 1 Stansbury's N.C. Evidence (Brandis Rev.) §155. In the present case, Norman Smith, District Loss Prevention Supervisor for United Parcel Service, testified that the records with which we are here concerned were kept under his supervision and explained how the records reflected the delivery point for parcels. That the witness failed to testify as to the procedure for final delivery of the parcels to their destination and to testify unequivocally that the signature of the person signing the receipts for the parcels was always obtained only at the point of delivery goes to the weight to be given these records rather than to their admissibility. We find no error in admitting these records into evidence.

Finally, plaintiff contends that the trial judge found no facts which support a finding of changed circumstances adversely affecting the welfare of the child. It is true that a change of residence alone does not show a substantial change of circumstances within the meaning of G.S. 50-13.7(a). Harrington v. Harrington, 16 N.C. App. 628, 192 S.E.2d 638 (1972). In the present case, however, there was more than a mere change of residence. In its order of 1 June 1978, the court found that plaintiff began living with his parents in Springfield, Virginia, some time after 5 December 1977 and exercised custody of the child there. At the time of the prior hearing plaintiff expressed an intent to remain living in Virginia. In its order of 8 August 1978,



the court found that plaintiff was living and working in Winston-Salem and that his parents had exercised the primary custody and control of the minor child. Plaintiff's failure to remain living in Virginia and to continue to exercise primary custody and control over the child adequately supports the court's conclusion that there had been a substantial change in circumstances affecting the welfare of the child. The trial judge did not err in awarding custody to the defendant-mother.

Affirmed.

Chief Judge MORRIS and Judge MARTIN (Harry C.) concur.

Report per Rule 30(e).

**APPENDIX B**

STATE OF NORTH CAROLINA
County of Forsyth

File # 80CR-2783
File #

The State of North Carolina
vs.
Betty S. Fungaroli
Defendant

In The General Court of Justice
Superior Court Division

INDICTMENT
TRANSPORTING CHILD OUTSIDE THE STATE WITH INTENT TO VIOLATE CUSTODY ORDER

THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 18th day of August, 1978, in Forsyth County Betty S. Fungaroli unlawfully and wilfully did feloniously take and transport and keep one Derek Cassidy Fungaroli, born May 19, 1977, a child under the age of sixteen years from Judith D. Fungaroli, the said Judith D. Fungaroli having been awarded custody of said child by a Court of competent jurisdiction in the State of North Carolina, to wit: the Forsyth County District Court, Civil Division, by the Honorable William H. Freeman, District Court Judge, on the 8th day of August, 1978, in case number 77CVD4340; said taking and transporting and keeping was with the intent to violate the above-mentioned Order of the Court, and was from the State of North Carolina to a point outside the limits of the State of North Carolina, to wit: the State of Virginia.

Richard R Lyle
Assistant District Attorney

WITNESSES:

Harold R. Wilson

The witnesses marked "X" were sworn by the undersigned foreman and examined before the grand jury, and this bill was found to be ☐ a true bill by twelve or more grand jurors ☐ not a true bill.

This ____ day of _____, 19__. That the undersigned foreman hereby attests that 12 or more Grand Jurors concurred in the finding of this True Bill of Indictment.

Grand Jury Foreman

AOC-L Form 201
Rev. 10/76

STATE OF NORTH CAROLINA
County of Forsyth

File # 78CR-27781
Film #

In The General Court of Justice
Superior Court Division

The State of North Carolina
vs.
Robert Michael Fungaroli
Defendant

INDICTMENT
TPANSPORTING CHILD OUTSIDE THE STATE WITH INTENT TO VIOLATE CUSTODY ORDER

THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 18th day of August, 19 78, in Forsyth County Robert Michael Fungaroli unlawfully and wilfully did feloniously take and transport and keep one Derek Cassidy Fungaroli, born May 19, 1977, a child under the age of sixteen years from Judith D. Fungaroli, the said Judith D. Fungaroli having been awarded custody of said child by a Court of competent jurisdiction in the State of North Carolina, to wit; the Forsyth County District Court, Civil Division, by the Honorable William H. Freeman, District Court Judge, on the 8th day of August, 1978, in case number 77CVD4340; said taking and transporting and keeping was with the intent to violate the above-mentioned order of the Court, and was from the State of North Carolina to a point outside the limits of the State of North Carolina, to wit; the State of Virginia.

Richard R Eyle
Assistant District Attorney

WITNESSES:

Harold R. Wilson

The witnesses marked "X" were sworn by the undersigned foreman and examined before the grand jury, and this bill was found to be ☒ a true bill by twelve or more grand jurors ☐ not a true bill.

This ____ day of _____, 19___. That the undersigned Foreman hereby attests that 12 or more Grand Jurors concurred in the finding of this True Bill of Indictment.

Grand Jury Foreman

AOC-L Form 201
Rev. 10/76



STATE OF NORTH CAROLINA
County of Forsyth

File # 78CR-27782
Film #

In The General Court of Justice
Superior Court Division

The State of North Carolina
vs.
Michael A. Fungaroli
Defendant

INDICTMENT
TRANSPORTING CHILD OUTSIDE THE STATE WITH INTENT TO VIOLATE CUSTODY ORDER

THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 18th day of August, 19 78, in Forsyth County Michael A. Fungaroli unlawfully and wilfully did feloniously take and transport and keep one Derek Cassidy Fungaroli, born May 19, 1977, a child under the age of sixteen years from Judith D. Fungaroli, the said Judith D. Fungaroli having been awarded custody of said child by a Court of competent jurisdiction in the State of North Carolina, to wit; the Forsyth County District Court, Civil Division, by the Honorable William H. Freeman, District Court Judge, on the 8th day of August, 1978, in case number 77CVD4340; said taking and transporting and keeping was with the intent to violate the above-mentioned Order of the Court, and was from the State of North Carolina to a point outside the limits of the State of North Carolina, to wit; the State of Virginia.

Richard R Eyle
Assistant District Attorney

WITNESSES:

Harold R. Wilson

The witnesses marked "X" were sworn by the undersigned foreman and examined before the grand jury, and this bill was found to be ☒ a true bill by twelve or more grand jurors ☐ not a true bill.

This ____ day of _____, 19___. That the undersigned Foreman hereby attests that 12 or more Grand Jurors concurred in the finding of this True Bill of Indictment.

Grand Jury Foreman

AOC-L Form 201
Rev. 10/76